No. 20241

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ELRANCO, INC., a Nevada corporation, EL RANCO HOTEL OPERATING CO., a Nevada corporation, BELDON R. KATLEMAN, MCA ARTISTS, LTD., a Delaware corporation, ROY GERBER, and MATT GREGORY,

Appellants,

vs.

RENE BARDY,

Appellee.

Opening Brief of Appellants MCA Artists, Ltd. and Roy Gerber.

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I.
INTRODUCTORY STATEMENT.

This brief is presented on behalf of Appellants MCA Artists, Ltd., (hereinafter referred to as "MCA") and its employee (at the time of the events with which the Court is concerned), Roy Gerber (hereinafter referred to as "Gerber").

In the interests of convenience, a Joint Statement of Points to Be Relied Upon was filed by all of the Appellants. However, because this is an appeal in an action for conspiracy against multiple alleged co-conspirators who are now appellants, separate briefs, relating the respective and sometimes differing positions of the alleged co-conspirators, are being filed. Every effort has been made by Appellants to minimize the length of the briefs and, to that end, where there is no difference in position between the various alleged co-conspir-

ators, Appellants have, at the suggestion of the Clerk of this Court and by stipulation, adopted and incorporated by reference various portions of the brief of the other Appellants. In this manner each of the Points To Be Relied Upon filed by Appellants jointly will be covered only once. Appellants MCA and Gerber disavow any intention to abandon or waive any points and arguments so incorporated by reference from the Briefs of the other Appellants.

II.

JURISDICTIONAL STATEMENT.

This case arose in the United States District Court for the District of Nevada in Las Vegas upon Appellee Bardy's Complaint and Amended Complaint [Clk. Tr. 1, 140] alleging Bardy to be a citizen of the French Republic, the Appellants "of a citizenship diverse" from that of Bardy, and that the amount in controversy exceeded ten thousand dollars ($10,000) exclusive of interest and costs [Clk. Tr. 1824; 28 U.S.C. §1332]. In addition, the Amended Complaint asserted a claim "for infringement of the trade name 'La Nouvelle Eve' " having an "adverse effect" on Bardy's interstate business [15 U.S.C. §1121; 28 U.S.C. §1338(a); 15 U.S.C. §1126 (b) (g) (h); Clk. Tr. 1824]. Appellants denied the District Court's jurisdiction under the so-called Lanham Act or under any theory of a federal law of unfair competition in the use of a title or trade name in their respective amended answers [Clk. Tr. 1836-1839; 217, 241, 301, 1125, 1142, 1201, 1210, 1223].

After a jury verdict in favor of Appellee [Clk. Tr. 1875-1876], the District Court entered a final judgment on the jury verdict [Clk. Tr. 1877-1879]. Alternative motions for Judgment Notwithstanding the Verdict or a new trial were duly made by Appellants [Clk. Tr. 2346, 2343, 2353, 2380] and denied without opinion [Clk. Tr. 2226]. Appellants filed a timely Notice of

Appeal [Clk. Tr. 2306, 2307, 2308], and a supersedeas bond [Clk. Tr. 2311-2313]. This Court's jurisdiction is invoked under 28 U.S.C. §1291.

III.
STATEMENT OF FACTS.

This is an appeal from a jury verdict and judgment and from a denial of Appellants' Motion for Judgment Notwithstanding the Verdict and New Trial in the District Court of Nevada upon a Complaint charging Appellants with a conspiracy to cause injury to certain "property" and "contractual rights" claimed by Appellee, Rene Bardy, with resulting damage to those alleged rights. On the conspiracy count with which this Brief is concerned, the District Court jury in Carson City, Nevada, awarded Appellee $251,200 compensatory damages and $225,000 punitive damages after a lengthy trial with over 3,000 pages of transcript and several hundred exhibits.

Appellant MCA at the time of the events leading up to this litigation, was a major talent agency, representing all types of talent both in the United States and in other parts of the world, seeking to obtain employment for such talent with potential employers. For its services, MCA received the standard agent's fee of ten per cent commission on employment obtained by it for its clients. Appellant Roy Gerber, at the time of these events, was an employee of MCA, working as a talent agent in the Las Vegas office of MCA.

A. The Initial Relationship Between Bardy and MCA.

In July, 1958, David Baumgarten, an employee of MCA, saw a French Revue at a nightclub in Paris called "La Nouvelle Eve" ("The New Eve") [Pltf. Ex. 75]. He communicated what he had seen to other MCA agents, particularly to David Stein (hereinafter referred to as "Stein") of the MCA Paris office and

Gerber of the MCA Las Vegas office [Pltf. Ex. 83]. On or about August 1, 1958, MCA, through Stein, and Appellee (hereinafter referred to as "Bardy"), producer of "La Nouvelle Eve", entered into an artist's agency contract whereby MCA agreed to represent Bardy in his career as a producer of night club shows, "without, however, guaranteeing the success of its endeavors" [Pltf. Ex. 73]. Bardy reserved to himself under that contract the right to refuse to accept any "business proposals submitted to him by MCA" [Pltf. Ex. 73]. *It was stipulated by Bardy at the trial that both MCA and Gerber fully and faithfully performed all of their duties under that contract until on or about April 1, 1959* [Rep. Tr. 2354-2355].

B. MCA's Representation of Bardy: The Original Contract Between La Nouvelle Corporation and Elranco Hotel Operating Co.

In the normal course of seeking employment for MCA's talent clients, Gerber told Beldon Katleman (hereinafter referred to as "Katleman"), owner of the El Ranco Hotel Operating Co. which operated the El Rancho Vegas Hotel, and other Las Vegas hotel owners, about the show at "La Nouvelle Eve" in Paris [Pltf. Exs. 448, 449, 450, 451]. In October, 1958, Katleman went to Paris to see the Revue presented by Bardy [Pltf. Exs. 450, 451]. The show was small and intimate, consisting essentially of tableaux [Pltf. Ex. 452]. Negotiations were commenced between Katleman and Stein to bring the intimate Revue to Las Vegas for a limited engagement. Later that same month Bardy came to Las Vegas on behalf of his La Nouvelle Eve Corporation to negotiate further with Katleman [Pltf. Exs. 454, 455]. In the course of those negotiations, Bardy saw such Las Vegas spectaculars as The Lido show then playing in Las Vegas. He expressed concern over his small, intimate show playing at the El Rancho Vegas in competition with such more

spectacular, expensive, and lavish shows as The Lido and The Folies Bergere [Rep. Tr. 2358, line 9, to 2360, line 4; Pltf. Ex. 456]. Gerber assured Bardy that Katleman neither wanted nor could afford a Lido type show and wanted a smaller, more intimate type of revue [Rep. Tr. 2359, line 22, to 2360, line 3]. Terms were finally agreed upon and in December, 1958 [Pltf. Ex. 465], an agreement was signed between El Ranco Hotel Operating Co., owner of the El Rancho Vegas Hotel, and La Nouvelle Eve Corporation [Pltf. Exs. 90, 90A]. It was agreed that in addition to the tableaux used in Paris, three specialty acts, hired domestically, would be included in the production. Further, because Katleman had objected to the looks of at least one of the girls he saw in Paris, Bardy agreed to replace her with a girl hired in the United States. [Rep. Tr. 2417-2421].

This turned out to be Miss Janine Caire, an attractive female French singer, hired by Bardy in New York [Pltf. Exs. 100, 101, 102] whose "contract" with Bardy became a matter of much dispute in the subsequent dealings between La Nouvelle Eve Corporation and Katleman. Bardy was never able to establish by documentary evidence the nature of his contract, if any, with Caire [Rep. Tr. 1279, 1284, 1943, lines 16-25], although he testified he had such an agreement for the original and extension term of his show's run at the El Rancho Vegas Hotel [Rep. Tr. 1278-1280].

The basic contract between La Nouvelle Eve Corporation and El Ranco Hotel Operating Co. provided for a ten weeks engagement beginning January 28, 1959 and the agreed upon price was a gross of $15,000 per week to La Nouvelle Eve Corporation [Pltf. Exs. 90, 90A]. In his negotiations with The American Guild of Variety Artists (hereinafter referred to as AGVA) the Guild having jurisdiction over night club performers in the United States, Bardy was advised, in December, 1958 and January, 1959, that because of quota

restrictions imposed by the Guild on foreign acts, his show could not play anywhere but Las Vegas. Accepting the restriction, Bardy signed, on behalf of La Nouvelle Eve Corporation, the standard AGVA Minimum Basic Agreement [Pltf. Ex. 105]. The show opened as scheduled at the El Rancho Vegas Hotel on January 28, 1959.

C. Negotiations to Extend the Original Contract: Developing Problems.

In February and March, 1959, negotiations were begun by Gerber, as Bardy's agent, Bardy and Katleman for an extension of the original ten week contract. Being in a poor bargaining position because of the AGVA restriction making it impossible to book the show elsewhere, MCA and Gerber vigorously exercised their efforts to prevail upon AGVA to lift the restriction [Pltf. Exs. 98, 215; MCA Ex. DR, EL, MP]. Such efforts on Bardy's behalf were continued by MCA and Gerber throughout the term of the contract [Rep. Tr. 2513, 2514]. During this same period, Janine Caire entered into a personal management contract with Matt Gregory (an independent personal manager in Las Vegas), and made demands for a higher salary and new gowns in any extension period [Rep. Tr. 2303, line 5, to 2304, line 23; 2306, lines 1-22; 2309, line 22, to 2310, line 19; 2312, lines 11-25; 2317, lines 1-7]. In the negotiations for the extension contract, Bardy gave to Gerber a letter dated March 5, 1959 [Pltf. Ex. 469] stating, for communication to Katleman, his agreement to Katleman's extension terms, particularly that Bardy could "guarantee" the extension of the contracts of the performers for the additional period and stating that if there was any need for replacements, he would take care of them from Paris [Pltf. Ex. 469; Rep. Tr. 2492-2496]. Only with respect to Charles Henchis, the choreographer, did Bardy request that Gerber attempt to assure himself of a

"signature" since "he has only signed for ten weeks in Las Vegas" [Pltf. Ex. 469; Rep. Tr. 2492]. Bardy later determined that he did not need a new agreement for Henchis because his original contract was for the run of the show and any extension [Pltf. Exs. 57, 473]; Gerber did, however, on March 6, 1959, obtain from Henchis a contract for this extension term as directed by Bardy [Pltf. Ex. 183]. This letter, along with a copy of the proposed extension agreement [Pltf. Ex. 492] were signed by Bardy on March 6, 1959, for delivery to Katleman. Katleman had insisted on Bardy's assurances that there be no cast changes without proper and approved replacements because he had heard that certain members of the cast would not remain [Rep. Tr. 2656-2658]. In particular, Katleman had been told that Aleta Morrison, a solo dancer [Rep. Tr. 2657, lines 12-19] and Janine Caire, a featured "chanteuse", would not remain in the show during the extension period [Rep. Tr. 2657, lines 24-25]. When the March 6, 1959 letter and proposed contract [Pltf. Exs. 469, 470, 472] were delivered to Katleman (stipulated to be a proper act on Gerber's part [Rep. Tr. 2495, lines 17-19], he held off signing the contract until March 13, 1959, because certain other replacements that were to be made by Bardy had not yet been made [Rep. Tr. 2657-2658]. Specifically these involved a replacement for a pregnant girl about whose performance on the stage a number of complaints had been received and a female mannequin whose appearance Katleman did not feel was in keeping with the rest of the show [Rep. Tr. 2658, lines 6-17]. With these reservations in mind, Katleman was reluctant to sign the extension agreement until conditions were fulfilled by Bardy [Rep. Tr. 2658, lines 23-25], conditions dating back to the period of the original contract and its negotiations [Rep. Tr. 2420, lines 7-19]. Further, there was a continuing dispute between Katleman and Bardy over who was to pay the transportation costs of bringing the troupe

from Paris and returning it at the end of the contract, along with other disputes involving among other things, finances, deductions, costs [Rep. Tr. 2421-2425].

D. MCA and Gerber's Attempts to Resolve Disputes: The Extension Contract and Its Negotiations: The Bardy-Katleman Feud.

Knowing of the differences between Bardy and Katleman on the above points, both as to the original and the proposed extension contract, Gerber, on or about March 6, 1959, telephoned Katleman, who was in New York, asking that he return to Las Vegas for a meeting with Bardy to clear up those matters and to get the contract signed. To this Katleman agreed. However, before Katleman could meet with Bardy in Las Vegas, Bardy departed mysteriously for Paris [Rep. Tr. 228, lines 17-19; 230, line 7, to 236, line 6], leaving word that he would give Katleman until March 16, 1959 to sign the extension agreement. Having flown over 2,000 miles to meet with Bardy at Gerber's request to work out the contract problems, Katleman was irate to find that Bardy had departed for Paris [Rep. Tr. 230-236; Pltf. Ex. 186]. However, after being placated by Gerber and being assured by Gerber of Bardy's good faith, and after being reassured by Bardy's promises in the March 6 letter given him along with the extension contract [Pltf. Ex. 469], Katleman signed the extension contract on March 13, 1959 [Pltf. Ex. 472]. Under the terms of the extension contract, Bardy was to receive $5,000 per week with the Hotel paying the salaries of the troupe, Henchis wardrobe and seamstress employees, AGVA Welfare Fund payments and MCA's commission [Pltf. Ex. 472]. On the original contract MCA's commission was $1500 per week. Under the agreed upon extension contract, MCA received commission only on the cost of the show, which to MCA was a reduction to $657 per week [Pltf. Exs. 473, 179; Rep. Tr. 1859-61, 2555]. Peter Holmes (herein-

after referred to as "Holmes"), a member of the cast of the show and Bardy's interpreter while he was in Las Vegas [Pltf. Ex. 467; Rep. Tr. 216, lines 7-17], wrote Bardy on March 10, 1959, telling him that Katleman was furious over Bardy's unexplained departure and describing Gerber's good efforts on Bardy's behalf to explain away Bardy's behavior [Pltf. Ex. 186]. Holmes again told Bardy in that letter that Aleta Morrison would not continue with the show in the extension term and would have to be replaced.

On March 13, 1959, Bardy wrote two letters to Holmes [Pltf. Exs. 191, 193]. He blamed his troubles with Katleman on Charles Henchis, the choreographer of the show (hereinafter referred to as Henchis) who, Bardy suspected, was undermining him with Katleman; he recognized that Morrison would probably not continue with the show and told Holmes that he was sending Regis Durieux, his Paris director (hereinafter referred to as Durieux) to take over "management" of the show during his absence [Pltf. Ex. 193]. Again, on March 15, 1959, Holmes wrote Bardy advising him of problems with the cast, of the need for replacements and of some of the difficulties with Henchis [Pltf. Exs. 196, 197].

In the interim, between March 6, when Bardy abruptly left Las Vegas in the midst of the negotiations, and March 20, 1959, Gerber obtained, as instructed by Bardy, an agreement from Henchis to continue with the show during the extension contract [Pltf. Ex. 183], tried to persuade Caire and Morrison to stay on [Rep. Tr. 2510, lines 15-21] and continued to pressure AGVA to lift its restrictions on the show's playing outside Las Vegas [MCA Ex. EL]. Katleman, on the other hand, desired the AGVA restriction be maintained for his own exclusive hold on the show [Tr. 2203-2205].

On March 20, 1959, not having heard from Bardy since he departed from Las Vegas on March 6, Ger-

ber wrote to Stein in Paris requesting that he make arrangements with Bardy for sending over the replacements Bardy had promised [MCA Ex. MW; Rep. Tr. 2501-2502 to line 10]. On March 23, 1959, Holmes wrote Bardy that Katleman was demanding that the promised replacements be made and outlined again to Bardy the continuing dispute between Bardy and Katleman over costs and billing [Pltf. Ex. 205]. On March 24, 1959, Bardy wrote Holmes that Katleman was "annoying" him and that he would put another show in Las Vegas and see that Katleman was boycotted by all French shows in the future if Katleman did not stop annoying him [Pltf. Ex. 267]. Bardy told Holmes to obtain the name of a lawyer in Las Vegas and to tell Katleman that if he wanted any replacements, he, Katleman, would have to come to Paris for them. He told Holmes that Durieux, his director, would be available in Las Vegas and that Holmes should look to Durieux for advice [Pltf. Ex. 267].

On March 25, 1959, the AGVA Executive Committee voted unanimously not to permit "La Nouvelle Eve" to play outside of Las Vegas, despite all MCA's efforts [Pltf. Ex. 509]. However, word of this AGVA action did not reach Gerber until March 30, 1959 [Pltf. Ex. 215].

AGVA was not named in Bardy's Complaint as a conspirator although the Las Vegas local representative of AGVA, Fred Haettel, was [Clk. Tr. 1, 3, lines 18-23]. Haettel was acquitted of the conspiracy charge by the jury despite the fact that he was a participant in practically every act and decision charged by Bardy as being evidence of the alleged conspiracy by MCA and Gerber [Clk. Tr. 1875-1876].

On March 25, 1959, Bardy finally wrote to Gerber and to Katleman to explain his theretofore unexplained departure from Las Vegas on March 6. His only explanation was that "urgent business" had required his

return to Paris and he told Gerber and Katleman that he was sending Durieux as his "substitute" in Las Vegas [MCA Ex. EJ].

On March 26, 1959, Durieux arrived in Las Vegas but brought no replacements or explanations with him. The same day, Gerber wrote Bardy again advising him of the problems with the cast, AGVA and Katleman. He again asked Bardy to send the promised replacements [Pltf. Ex. 475]. On March 29, 1959, Durieux, Bardy's Las Vegas "substitute", cabled Bardy that unless Bardy sent the replacements as agreed, Katleman would terminate the show on April 8, 1959, the first day of the show's run under the extension contract [Pltf. Ex. 211]. On March 30, 1959, Bardy cabled Durieux in reply that he would not be "blackmailed" by Katleman and that instructions would follow in a letter [Pltf. Ex. 213]. On March 31, 1959, Durieux cabled Bardy that the situation with Katleman was "grave" and asked Bardy to telephone him (Durieux) [Pltf. Ex. 212]. The same day Bardy wrote Holmes telling him to obtain the name of the attorney in Las Vegas who had previously made trouble for Katleman and the El Rancho Vegas Hotel [Pltf. Ex. 217]. He instructed Holmes to have the show present and ready to go on stage on the evening of April 8 and to get in touch with the French consul [Pltf. Ex. 217]. The same day, Bardy cabled Durieux that there was "no use" telephoning [Pltf. Ex. 220] and cabled Katleman that he would hold Katleman to the extension contract [Pltf. Ex. 219]. Aside from Bardy's totally uninstructive March 25 letter to Gerber explaining his sudden departure from Las Vegas on March 6, Bardy did not communicate with Gerber or MCA at all between March 6 and March 31, 1959, despite all of the foregoing described events. All of Bardy's plans and instructions regarding the replacements, the extension contract, Katleman's demands and what to do in

the event of a cancellation, were communicated to Holmes and Durieux but not to Gerber or MCA. Bardy stipulated repeatedly during the trial that prior to April 1, 1959, MCA and Gerber faithfully performed their duties as Bardy's agents in Las Vegas and that at least as to them, the alleged conspiracy occurred on or after April 1, 1959 [Rep. Tr. 2354-2355].

E. The Anticipatory Breach Dispute— April 1 to 8, 1959.

On or about April 1, 1959, Katleman decided that there was an anticipatory breach of the extension contract by Bardy and determined to place the entire question of his contractual relationships with Bardy's La Nouvelle Eve Corporation before AGVA, the organization having jurisdiction over such disputes. Katleman then asked Gerber, as Bardy's agent, to give him in writing a statement as to whether Bardy had or had not made arrangements for the promised replacements [Rep. Tr. 2503-2509, line 23]. Gerber had just been told by Holmes of Bardy's provocative letter to him saying that he would not send the replacements and that if Katleman wanted them, he would have to come to Paris to get them [Pltf. Ex. 217, p. 3]. Gerber told Katleman that he could not unilaterally declare a breach of a contract that was to commence eight days later and Gerber believed that submission of the dispute to AGVA was the proper procedure [Rep. Tr. 2506-2514]. Gerber told Katleman on April 1, 1959 that to date he had not been able to get "anything definite" from Bardy about any of the replacements. [Pltf. Ex. 222, p. 3]. That same day Katleman obtained from Janine Caire and Aleta Morrison letters stating that neither had made any agreement to remain with the show after the expiration of the original ten weeks engagement [Pltf. Ex. 222, pp. 2, 5]. Katleman then wrote Mr. Jackie Bright of AGVA in New

York, sending him (1) a copy of the extension contract as signed by Katleman for El Ranco Hotel Operating Co. and Bardy for La Nouvelle Eve Corporation; (2) a copy of Bardy's March 6, 1959 letter to Gerber for transmittal to Katleman guaranteeing the contracts of the cast members for the extension contract period and agreeing to make any necessary replacements from Paris; (3) a copy of the Gerber, Caire and Morrison letters of April 1, 1959 above described and (4) a memorandum from Tom Douglas to Katleman saying that it had come to his attention that several members of the cast had no contracts beyond the April 7 date and did not wish to return for the extension contract period [Pltf. Ex. 222, p. 4]. Although Douglas, under cross-examination, testified he did not recall signing the memorandum [Rep. Tr. 469-470], he testified that he had knowledge of its contents, specifically that Aleta Morrison planned when she came to Las Vegas with the show to go to the Paladium in London when the original Las Vegas contract was finished [Rep. Tr. 471-472, to line 17].

Katleman's letter to Jackie Bright at AGVA forwarding the above, stated that because he anticipated a definite breach of contract he wanted AGVA to "justify our position" [Pltf. Ex. 222, p. 1].

Gerber demanded copies of the Katleman letter to Bright, along with its enclosures, and sent them to Paul Sherman, MCA's house counsel in New York [Pltf. Ex. 477; Rep. Tr. 2503-2505, line 10] saying that as things stood between Bardy and Katleman there was not much hope for the show being held beyond April 7; that if AGVA upheld Katleman's position, there would be no choice but to go along with Katleman and close the show out [Pltf. Ex. 477]. Gerber testified that he felt that if Sherman agreed, he could proceed to make arrangements for the return of the performers and the show intact to Bardy and avoid chaos on April

8 with the troupe possibly stranded in Las Vegas [Rep. Tr. 2503-2509, to line 24].

During the week of April 1 to 8, 1959, Gerber "hounded" "four or five times a day" Holmes and Durieux regarding the promised replacements [Rep. Tr. 2510, 2511; Pltf. Ex. 493]; tried to prevail upon Caire and Morrison to remain with the show [Rep. Tr. 2510, lines 16-23]; argued with the AGVA representatives to refuse to support Katleman's position [Rep. Tr. 2514, line 1, to 2515, line 2] and was told by Holmes that Bardy was on his way from Paris and would stop in New York to argue his case with AGVA. Bardy, Holmes said, would arrive in Las Vegas on April 6 [Rep. Tr. 2511, lines 3-9]. But Bardy never arrived.

Replying to Gerber's letters of March 20 and 26, advising Bardy of all of the difficulties, Bardy cabled Gerber on April 1, 1959 that he "regretted" any misunderstanding but gave Gerber no explanations or instructions [Pltf. Ex. 225]. On April 2 and 3, 1959 Bardy wrote Gerber [Pltf. Ex. 225, 226, 231, 231] twice and cabled him twice regarding Katleman's demands. Those letters, being in French, were received two or three days later, given to Peter Holmes to translate, and were actually received by Gerber even later [Pltf. Ex. 496]. The April 2 letter from Bardy dealt principally with financial disputes between Bardy and Katleman and blamed the alleged extra costs under the original contract on the extravagance of Charles Henchis [Pltf. Ex. 231]. The April 3 letter from Bardy to Gerber acknowledged receipt of Gerber's letter of March 26 regarding replacements. Bardy stated that he was quite ready to make some replacements, that he had a beautiful "nude dancer" as a replacement and that he stood ready "to do the impossible"—all provided Katleman would (1) come to Paris to approve the replacements, (2) hold Bardy harmless from any claims

made against Bardy by the girls who were to be replaced and (3) pay the transportation costs. He made no mention of a replacement for Caire or Morrison [Pltf. Exs. 232, 234].

On April 6, 1959 Stein of MCA's Paris office wrote Gerber protesting Katleman's position and expressing amazement that AGVA would go along with Katleman unless, *in fact,* Bardy failed to deliver the show as agreed on April 8 [Pltf. Ex. 478; MCA Ex. ER]. He regarded Katleman's pressures prior to April 8 as "strong arm methods" [Pltf. Ex. 478]. In fact, AGVA had already decided to go along with Gerber's demands that the Guild not declare an anticipatory breach and to hold off until April 8 to see whether Bardy would perform [Rep. Tr. 2142, 2143]. On April 6 Bardy cabled MCA in Las Vegas protesting Katleman's threatened cancellation of the extension contract and calling upon Gerber and AGVA to defend his position [Pltf. Ex. 239].

Also on April 6, 1959, El Ranco Hotel Operating Co. gave notice to MCA that it was exercising an option on the show for 1960 pursuant to the terms of the original contract between El Ranco and La Nouvelle Eve Corporation [Pltf. Ex. 238]. This notice was sent to La Nouvelle Eve Corporation and Bardy by Gerber on April 7, 1959 [Pltf. Ex. 240].

On April 7, 1959, Janine Caire and Aleta Morrison, in company of Matt Gregory, Caire's manager [Pltf. Ex. 306] left Las Vegas for Los Angeles, California [Rep. Tr. 894-895]. Caire had demanded a higher salary and new costumes to perform during the extension period and testified these were denied her by Bardy. As stated before, Bardy had refused to send any of the agreed-upon replacements unless Katleman came to Paris to see them. On April 7, Bardy called Durieux to contact the French consul [Pltf. Ex. 242].

F. The April 8, 1959, Cancellation of the Show by Katleman.

At show time on April 8, 1959, the first day of the run under the March 6 extension agreement, the security police at El Rancho Vegas Hotel refused to let the show go on [Rep. Tr. 2515-2517, line 16]. Present at the time besides the cast were Gerber, Holmes (with an attorney for Bardy) and Haettel, the AGVA representative [Rep. Tr. 2515; Pltf. Ex. 247]. Absent were Caire, Morrison and the promised replacements. Those present were told that because of the absence of Caire and Morrison and the failure of Bardy to send the replacements, the show was cancelled [Rep. Tr. 2515-2516]. Gerber protested [Rep. Tr. 2518-2519, line 19] and demanded that the AGVA official present, Haettel, rule whether the cancellation was proper [Rep. Tr. 2520, lines 6-14]. Haettel refused to do so on the ground that his superior in AGVA, Mr. Mazzei, Western Regional Director, would be in Las Vegas the next morning and could review the matter [Rep. Tr. 2520, lines 14-16].

On April 8 or 9 [Pltf. Ex. 244] Durieux cabled Bardy of the events of April 8 at the El Rancho Vegas Hotel and advised Bardy to contact AGVA for a ruling. Gerber, on April 9, sent Haettel copies of Bardy's letters of April 2 and 3 [Pltf. Exs. 231, 232], saying that these would help Haettel in seeing both sides of the dispute [MCA Ex. MX].

On April 9, 1959, Mazzei of AGVA arrived and after reviewing the events with Haettel, advised Gerber that Bardy was in breach and that arrangements would have to be made to return the troupe to Paris [Rep. Tr. 2521, line 23, to 2522, line 5]. On April 10, Gerber wired Stein in Paris stating AGVA's ruling, saying that Bardy's expected presence would have helped, and requesting Stein to arrange with Bardy for the

troupe's return [Pltf. Ex. 264]. The same day, Bardy sent Durieux a "confidential" cable telling Durieux to return the troupe to Paris [Pltf. Ex. 269].

G. Negotiations for a Modified Extension Contract—April 8 to 15, 1959.

In the interim, on April 8, 9 and 10, Gerber was in almost constant meetings with Haettel, Durieux, Holmes and Katleman, trying to resolve the dispute. Business at the Hotel was poor with the show's replacement, Monique Van Vooren, and Katleman decided to reconsider [Rep. Tr. 2667, line 16, to 2668, line 11]. In these later negotiations Katleman offered to resolve the dispute by resuming the show the next week with a reduced cast, without the replacements, and with a reduction in Bardy's participation from $5,000 to $2,000 a week for the term of the extension contract [Rep. Tr. 2538, line 11, to 2539, line 10].

On April 9, 1959, Bardy cabled Durieux that his "representative" would be in Las Vegas Monday and told Durieux to be present with the troupe every night at the El Rancho Hotel with "bailiff" [Pltf. Ex. 260]. Also on April 10, Bardy wrote Stein saying that "if" he had known about Katleman's decision to cancel the show, he would either have accepted the conditions or would have brought the show back to Paris on April 8 [Pltf. Ex. 265]. Bardy told Stein on April 10, 1959, that that was the first time he knew anything about Katleman's cancellation of the show on April 8 [Pltf. Ex. 482].

On April 10, 1959, Bardy replied to Durieux' cable of April 8 or 9 [Pltf. Ex. 269] in a "confidential" cable to Durieux, telling Durieux to return the troupe to Paris. Instead, Durieux orally accepted Katleman's offer on behalf of Bardy and agreed to call or cable Bardy for authority to sign a written contract embodying Katleman's offer [Rep. Tr. 2539, lines 13-21].

Durieux admitted accepting on behalf of Bardy, but later maintained that he was "personally shouldering" the responsibility [Rep. Tr. 292-293; *Cf.,* Rep. Tr. 2543, line 21, to 2544, line 8]. On April 11, 1959, Bardy cabled Durieux that he would not give Durieux authority to sign the new agreement until the deal was confirmed to him by MCA. At the same time, Bardy cabled Gerber for confirmation of the deal [Pltf. Ex. 270]. Gerber immediately cabled Bardy on April 11, 1959 confirming the deal and advised Bardy to accept, saying that he "honestly felt", along with AGVA, Durieux and Holmes, that this was the only solution [Pltf. Ex. 271].*

Acting on Durieux' oral acceptance of Katleman's offer, the show went back into rehearsal on April 12 after the AGVA official advised the performers they could either stay or return to Paris [Rep. Tr. 2544, line 21, to 2545, line 23]. Nine or ten of the troupe of 32 returned to Paris [Rep. Tr. 2546, lines 11-12]. On April 11, Bardy advised Stein in Paris that he found the $2,000 "disappointing" but did not reject it [Pltf. Ex. 500]. On April 12, Henchis cabled Bardy that AGVA had ruled his dancers to be free of their contract with him and asked Bardy if he could give them work in Paris [Pltf. Ex. 273]. The record indicates no reply.

H. The Period of the Modified Extension Contract—April 15 to June 2, 1959.

On April 15, 1959, Gerber sent to Katleman a letter containing a cost breakdown on the "modified" version of La Nouvelle Eve [Pltf. Ex. 282]. All costs of the show were to be paid by the Hotel, with $2,000 to be paid to Bardy. The term was for seven weeks. On

*Bardy's ex-wife, who was staying with him in Paris, testified Bardy told her to wire Durieux, "I agree for $2000 or $2500" and that she sent the wire from Bardy's apartment [Rep. Tr. 1767-1770].

April 16, 1959, Durieux cabled Bardy that the troupe had "restarted" that day [Pltf. Ex. 284].

The events during the period from about April 1 to April 10, 1959, caused Stein and Gerber to engage in an exchange of cables and memoranda explaining to each other from their distant vantage point what was transpiring and why [Pltf. Exs. 438, 294, 493, 494, 495, 496, 497, 500, 501; MCA Ex. MZ, NA]. These cables and memoranda show that Bardy disclaimed to Stein knowledge of facts which Bardy clearly had, blamed Gerber for "disappearing" contrary to the facts, and leading Stein to be extremely critical of Gerber, for which Gerber demanded an apology and, which, when all the facts were known to Stein, he received.

On April 20, 1959, Stein wrote Gerber after a meeting with Bardy saying that as soon as the contracts for the extension were received either Bardy would sign them or authorize Durieux to do so [Pltf. Ex. 494].

On April 22, 1959, Stein wrote Gerber that Bardy was contemplating legal action against all of the parties [Pltf. Ex. 294]. On or about May 1, 1959 [Pltf. Ex. 496], Robert Broder, attorney for a Mr. Kindler, then said to be the owner of La Nouvelle Eve, contacted Gerber, taking the position that Durieux had no authority to accept the offer for the modified extension contract [Pltf. Ex. 95]. On May 6, 1959, Bardy through his company, l'Escarpolette, sued in Paris for "annulment" of the MCA-Bardy agency agreement and damages of ten million francs [Pltf. Ex. 310; MCA Ex. MZ].

From April 15 to June 2, 1959, the modified version of La Nouvelle Eve played out the extension contract at El Rancho Vegas. Neither Bardy nor Broder ordered the return of the troupe to Paris. Katleman refused to pay Bardy until their affairs were straightened out and on and after May 14, refused to deal with Gerber,

MCA or anyone but AGVA regarding moneys alleged to be due Bardy [MCA Ex. NA]. On May 25 and 26, Bardy cabled Durieux that Broder was handling the extension agreement terms with Katleman [Pltf. Exs. 326, 327].

On June 2, 1959, the show closed and the troupe returned to Paris [Rep. Tr. 2035, lines 3-19]. When they arrived, they found that Bardy's place of business was closed in Paris [Rep. Tr. 2039, lines 18-19, 2040, 2042, 2048].

I. Negotiations for "La Nue Eve" and the Henchis Dancers: Run of the Show, July 29 to October 21, 1959.

In Paris after the return of the troupe, including Charles Henchis, litigation ensued between Bardy and Henchis over Henchis' contractual obligations to Bardy in Las Vegas and in Paris [Pltf. Ex. 336; Rep. Tr. 2087, line 24, to 2088, line 14]. The District Court refused to permit Henchis to testify as to the outcome [Rep. Tr. 2088]. Henchis then advised Matt Gregory, that he was available with his troupe to work in the United States and Gregory, sometime on or near June 8, 1959, flew to Paris to sign Henchis to an exclusive management contract [Rep. Tr. 2051, 2700; Pltf. Ex. 334].

Representing Henchis, Gregory first tried to get Henchis' troupe into the Sahara Hotel in Las Vegas [Rep. Tr. 2334] but was not successful. Later, he entered into a contract for Henchis and his dancers to open at the El Rancho Vegas Hotel on July 29, 1959 [Rep. Tr. 2550, lines 13-19]. Neither MCA nor Gerber were parties to any of these transactions. The Charles Henchis dancers, billed as "Les Girls de Paris" played the El Rancho from July 29, 1959, until October 21, 1959 under the title "La Nue Eve", meaning "The Nude Eve", along with the Joe E. Lewis show [Pltf. Ex. 141-A, 141-B].

J. The Present Action and Verdict Below.

Bardy did not pursue his action in Paris against MCA and it was dismissed. However, on March 15, 1961, this action for conspiracy was filed in Las Vegas against, among others, MCA and Gerber. The Complaint was amended on July 5, 1961 [Clk. Tr. 1, 140].

Insofar as Appendants MCA and Gerber are concerned, it has been Appellee's contention that on or after April 1, 1959, they jointly and severally conspired with the other Appellants or joined in an existing conspiracy with the other Appellants to (1) violate and use Bardy's property rights by Katleman's presentation of the show "La Nouvelle Eve" from April 8 to June 2, 1959, the period of the executed extension agreement; (2) cause public confusion by Katleman's presentation of a different show from July 29, 1959 to October 21, 1959 under the title "La Nue Eve"; (3) cause injury to the reputation of the title "La Nouvelle Eve" by Katleman's presentation of a different show from July 29, 1959 to October 21, 1959 under the title "La Nue Eve"; (4) deprive Bardy of the services of his performers at his club in Paris by Katleman's continued employment of certain of those performers from July 29 to October 21, 1959, and (5) breach their agency contract with Bardy [Rep. Tr. 3090 *et seq.*].

Over the objection of Appellants, the trial of the case was transferred from Las Vegas to Carson City, Nevada [Clk. Tr. 1586-1590; 1700-1701] where the trial commenced on August 5, 1963. On August 20 1963, the jury returned a verdict in two parts: one against El Ranco Hotel Operating Co., for breach of contract assessing damages of $27,281.00; the second against El Ranco Hotel Operating Co., Beldon Katleman, MCA Artists, Ltd., Roy Gerber and Matt Gregory, assessing general damages for civil conspiracy in the sum of $251,200 and punitive damages in the sum of $225,000, or a total of $476,200 on the conspiracy count

[Clk. Tr. 1875]. After denial of all post trial motions for Judgment Notwithstanding the Verdict or New Trial, this appeal followed [Clk. Tr. 2306, 2307, 2308].

IV.
QUESTIONS PRESENTED.

1. Whether the verdict and judgment of conspiracy against MCA and/or Gerber were not supported by the evidence and were contrary to law.

2. Whether the District Court erred in its instructions to the jury on the burden and order of proof in the law of conspiracy.

3. Whether the District Court erred in refusing to instruct on the "two conspiracies" and "two issues" rules and whether the verdict and judgment are inconsistent with those rules.

4. Whether Appellee suffered any legal injury to any property or contractual right and, if so, whether said injury was proximately caused by the act or failure to act of MCA or Gerber pursuant to any conspiracy.

5. Whether the award of compensatory damages in the sum of $251,200 to Appellee is against the weight of the evidence, contrary to law, excessive, and based on speculative evidence.

6. Whether the award of punitive damages of $225,000 to Appellee is against the weight of the evidence, contrary to law, excessive, and based on speculative evidence.

7. Whether it was error to permit the jury to consider alleged "lost profits" in determining damages.

8. Whether it was error to submit to the jury, over objection, the issue of trade name infringement under the Lanham Act.

9. Whether it was error, in the absence of any patent, trademark or copyright registration of Appellee's alleged property, for the District Court to submit a naked claim of unfair competition to the jury.

10. Whether Appellants received a fair trial or were deprived of their constitutional and statutory rights to a fair trial.

11. Whether the District Court erred in denying Appellants' motion to transfer the trial of the case to Las Vegas, Nevada.

12. Whether the District Court erred in admitting, over Appellants' objections, so-called "similar business" evidence on damages.

13. Whether the District Court erred in denying Appellants' Motions for a Directed Verdict, Judgment Notwithstanding the Verdict, and for a New Trial.

14. Whether MCA or Gerber breached the agency contract with Bardy.

15. The issues regarding the Nevada Fictitious Name Statute and its application to the facts herein, whether Bardy was estopped to bring this action in his own name and whether he was the real party in interest, whether the District Court erred in refusing to stay the proceedings below for arbitration, the refusal of proffered instruction on conspiracy, misconduct of counsel, errors by the District Court Judge on admissibility of evidence, and the effect of various assignments made to Bardy during the pendency of this action are specified and argued in the opening brief of Appellants El Ranco, Inc., El Ranco Hotel Operating Co. and Beldon Katleman and are adopted herein and made a part hereof by reference.*

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*Appellants MCA & Gerber have included as Appendix B to this Brief, their more detailed Specification of Errors to be relied upon on appeal.

V.
SUMMARY OF ARGUMENT.

The conspiracy verdict and judgment against Appellants MCA and Gerber have no support whatever in the record and resulted from confusion, error and prejudice on the part of the jury, induced by the District Court's conduct of the case and Appellee's dragnet approach to all those involved in his business affairs. No wrongful acts were commited by MCA or Gerber; they were convicted only because as a result of their contractual relationship to Bardy, they were necessarily and inevitably involved in the tumultuous transactions between La Nouvelle Corporation and Katleman's Hotel. There is no support whatever for the necessary finding that MCA or Gerber had knowledge of or the specific intent to conspire against Bardy or to join any existing conspiracy against him.

The District Court erred in the order of presentation of the issues to the jury and in its instructions on the burden of proof. The court permitted the jury to treat civil conspiracy as a tort and then to find that one or more of five alleged wrongful acts were perpetrated by the alleged co-conspirators. The jury should have been required to find on each of the alleged wrongful acts and then determine which, if any, of the alleged co-conspirators were jointly or severally responsible. Failure to do so violated the two-conspiracies rule and the two-issues rule and is reversible error.

There was no evidence to support a finding that MCA Artists, Ltd., a corporation, was a conspirator for any purposes. The acts of Gerber, if wrongful, were not authorized and his acts were not ratified.

None of the five alleged wrongful acts done pursuant to the alleged conspiracy resulted in any damage to Bardy; none was proximately caused by any act of MCA or Gerber. The damages award of $476,200 was based purely on speculative, remote and inadmissible

evidence. There was no breach of the extension contract causing damage to Bardy; there was no proof whatever that Bardy had a protectible trade name nor of any damage to the alleged "trade name", "La Nouvelle Eve"; there was no proof that Bardy was deprived of his performers in Paris, and there was no proof of a breach of the agency contract between Bardy and MCA. Even if any of those had been proved, and they were not, there was no evidence to support any finding that MCA or Gerber knowingly and intentionally did any act proximately causing any such injury.

The award of punitive damages in the sum of $225,000 has no support in the record, is grossly excessive and contrary to law. In no event could the award be sustained against MCA.

Finally, Appellants did not receive a fair trial because of the transfer of the case from Las Vegas to Carson City, Nevada, over Appellants' objections, because they did not have a fair and impartial jury, because of misconduct by the trial judge, and because of the haste with which the jury decided the complex issues in the case.

The remainder of Appellants' points on appeal are contained in Co-Appellants' Brief and are incorporated herein by reference.

VI.

THE CONSPIRACY VERDICT AND JUDGMENT AGAINST APPELLANTS MCA AND GERBER ARE NOT SUPPORTED BY THE EVIDENCE AND ARE CONTRARY TO LAW.

A. Civil Conspiracy Is Not an Actionable Tort and Liability Requires Proof of the Commission of Independent Legal Wrongs by the Parties to Be Charged.

The District Court erred in instructing the jury, over the objection of defendants, that conspiracy in and of

itself is an actionable tort [Rep. Tr. Pre-Trial Conf. 101, 105]. Under the court's instructions, the jury was lead to believe that the mere combination of persons for the purpose of committing an alleged wrongful act was actionable in itself, rather than instructing the jury that it must find one or more *independent torts,* each element of which was established by the evidence, before it reached the conspiracy issue as a means of establishing joint liability for those separate and independent torts (*Dixon v. City of Reno,* 187 Pac. 308 (Nev. 1920)).

In its instructions, the court throughout treated the conspiracy cause of action as one for tort rather than as one of multiple liability for independent torts. It consistently treated conspiracy as though it were a separate offense as it is in *criminal law* and, statutorily, under the anti-trust laws. However, the vast majority of jurisdictions today hold that conspiracy *is not* an independent tort (*Goldfield Consolidated Mines Co. v. Goldfield Mines Union,* 159 Fed. 500, 517 (D. Nev. 1908); *Brictson v. Woodrough,* 164 F. 2d 107 (8th Cir. 1947), cert. den. 334 U.S. 849, 68 S. Ct. 1500, 92 L. Ed. 1772 (1947); *De Bobula v. Goss,* 193 F. 2d 35 (D.C. 1952); *Rutkin v. Reinfield,* 229 F. 2d 248 (2nd Cir.), cert. den. 352 U.S. 844, 77 S. Ct. 48, 1 L. Ed. 2d 60 (1956); *Radford v. United States,* 264 F. 2d 709 (5th Cir. 1959); *Carlton v. Manuel,* 187 P. 2d 538 (Nev. 1947); *Agnew v. Parks,* 172 Cal. App. 2d 756, 343 P. 2d 118 (1959)). Where two or more persons are sued for a civil wrong, "*it is the civil wrong resulting in damage, and not the conspiracy, which constitutes the cause of action.*" (*Mox, Inc. v. Woods,* 202 Cal. 675, 262 Pac. 302 (1927) (Emphasis added)). Thus the court was in error in stating repeatedly "Conspiracy is a tort." The Restatement of Torts does not recognize conspiracy as a tort. Section 765 of the Restatement of Torts recognizes an inde-

pendent tort called "Concerted Refusal To Deal" with its own elements and defenses arising from the boycott cases, but a tort called "conspiracy" is non-existent under modern law. The court seriously and prejudicially misled the jury by instructing it that if it found a conspiracy it need not proceed further to determine whether the independent tort and contract causes of action had been proved [Rep. Tr. 3088, 3108, line 16, to 3124, line 19; 3200, lines 7-25; 3202, line 5].* Such instructions were at worst plain error and at best prejudicially confusing.

Properly, the court should have reversed the order of its instructions as requested by defendants so as to require the jury to make express findings on each of the alleged tortious acts and contract breaches. It should then have instructed the jury that if they found liability on one or more of those causes of action, then they could determine under the rule of conspiracy which of the multiple appellants participated in each such wrong or had responsibility for such wrong vicariously.

B. The Law of Conspiracy: Knowledge, Specific Intent and Burden of Proof.

Even under the District Court's instructions to the jury on conspiracy requiring that each element thereof be established by a preponderance of the evidence (which instructions are erroneous and unfair to Appellants as set forth in the brief of the other Appellants), there was clearly no evidence to support a finding of conspiracy on the part of either MCA or Gerber.

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*The District Court instructed: "Now, if you find in favor of plaintiff on the conspiracy claim, it will not be necessary for you to go any further. In other words, if you find for the plaintiff on the claim for damages of civil conspiracy, you will not consider any of these other matters [e.g. breach of contract, infringement of trade name, deprivation of employees, etc., the independent torts alleged.] . . . because the damages claimed there are the damages which the plaintiff says proximately resulted from this conspiracy." [Rep. Tr. 3108, lines 16-24].

The District Court instructed the jury regarding the definition of a conspiracy and with respect to the *specific intent* necessary to establish a conspiracy. Most importantly, the District Court instructed the jury that:

> "Mere similarity of conduct among various persons and the fact they may have associated with each other and may have assembled together and discussed common aims and interests does not establish proof of the existence of the conspiracy." [Rep. Tr. 3082].

The reason for this *individual and specific intent* rule was well stated by Mr. Justice Jackson, and is particularly appropriate to this case. He said:

> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together."
>
> (*Krulewitch v. United States,* 336 U. S. 440, 454, 69 S. Ct. 716, 93 L. Ed. 790 (1959)).

It was stipulated that MCA and Gerber properly and faithfully performed all of their duties under their agency contract with Bardy until on or about April 1, 1959 [Rep. Tr. 2354-2355]. Up to that point, concededly, all of Bardy's difficulties were with Katleman, El Ranco Hotel Operating Co., Henchis, Gregory, Claire and Morrison, not with MCA or Gerber.

To support the jury's verdict under the District Court's instructions, therefore, Bardy was required to establish by a "preponderance of the evidence", *i.e.,* by proof that "something is more likely so than not so" [Rep. Tr. 3066] that (1) on or about April 1, 1959, MCA and Gerber, jointly or severally, knowingly and intentionally, and with a specific intent to commit specific unlawful acts, entered into an agreement with one

or more of the other alleged conspirators, or, (2) knowingly and intentionally and with the same specific intent, joined a pre-existing conspiracy to do specific unlawful acts (*United States v. Falcone,* 310 U.S. 620, 60 S. Ct. 1075, 84 L. Ed. 1393 (1940)). As the District Court instructed the jury, it is not the illusion of conspiracy which may arise from similarity of conduct, association or purpose that establishes a conspiracy; (*Canella v. United States,* 157 F. 2d 476 (9th Cir. 1946); *B. F. Goodrich v. Naples,* 121 F. Supp. 345 (S.D. Cal. 1954)); there must be an *agreement* between two or more persons with *specific intent to* commit *unlawful* acts.

Since a charge of conspiracy comes down to us "wrapped in vague but unpleasant connotations" and "sounds historical overtones of treachery, secret plotting and violence on a scale that menaces social stability" (*Krulewitch v. U.S., supra,* at p. 448), it is absolutely essential that the Appellate Court prevent unjustified inferences to be drawn from the facts of record.

In *Couie v. Local Union No. 1849, United Brotherhood of Brotherhood of Carpenters and Joiners of America* (316 P. 2d 473, 476 (Sup. Ct. Wash.)), the court said:

> "While it is recognized that a conspiracy may be and usually must be proved by acts and circumstances sufficient to warrant an inference that the defendants have reached an agreement to act together for the purpose alleged, the test of the sufficiency of the evidence is that the facts and circumstances relied upon to establish the conspiracy *must be inconsistent with a lawful or honest purpose and reasonably consistent only with the existence of the conspiracy.*" (Emphasis added).

(See also: *Robinson v. Stevens,* 249 F. 2d 731 (9th Cir. 1957); *Asheim v. Pigeon Hole Parking, Inc.,* 175 F. Supp. 320 (D.C. Wash. 1959); *United States v.*

Univis Lens Co., 88 F. Supp. 809, 813 (S.D.N.Y. 1950)).

Under this rule it is incumbent upon the Court itself to consider each fact and circumstance alleged to establish and to deny the conspiracy (*Brooklyn National League Baseball Club v. Pasquali,* 66 F. Supp. 117 (E.D Mo. 1946); *Seaboard Surety Co. v. Permacrete Constr. Co.,* 130 F. Supp. 184 (E.D. Pa. 1954); *Fife v. Great Atlantic & Pacific Tea Co.,* 52 A. 2d 24 (Pa. 1947)). The court must assure itself that the jury did not rely upon inference to supply facts where the rule requires that the facts supply the inference (*Heekin Can Co. v. Kimbrough,* 196 F. Supp. 912 (W.D. Ark. 1961)).

As the District Court has indicated in these proceedings below, so-called "conscious parallelism" is not sufficient, and this is especially true where, as here, by virtue of the continuing contractual and business relationships between Appellee, on the one hand, and various of the Appellants on the other, consciously parallel activity is inevitable. In a conspiracy case charging, for example, unlawful involvement in narcotics, prostitution, etc., once two or more defendants have been factually linked to those *malum in se* activities, it may be reasonable to infer knowledge, intent and unlawful purpose. Where, however, two parties are linked to one another simply by virtue of participation by contract or business relationships in ordinary lawful, commercial activities, albeit stormy ones, it is wholly unreasonable to infer a conspiracy. In the narcotics situation, often but one inference can be drawn; in the commercial transaction situation, any number of inferences may be drawn which may be equally consistent. As indicated from the cases cited above in the commercial transaction situation, the evidence of the unlawful agreement and the knowing and willful participation therein must be proved by clear and unequivocal evidence and the facts must permit but one inference—that

of unlawful activity. (*Direct Sales Co. v. United States,* 319 U.S. 703, 63 S. Ct. 1265, 87 L. Ed. 1674 (1942)).*

*In *Direct Sales Co. v. United States, supra,* the issue was whether the evidence supported a conspiracy against a pharmaceutical house supplying narcotics in large quantities to a certain doctor. The main defense was based on the ruling of the *Falcone* case (*United States v. Falcone,* 109 F. 2d 579 (2d Cir. 1940)) where the court had held that the supplier of ingredients for the operation of a still was not guilty of conspiracy merely because he *had knowledge* of the unlawful purpose of the purchases. However, in *Direct Sales,* the issue was whether there was *more than mere knowledge, i.e.,* whether there was an agreement and *a stake in the venture* in a case involving narcotics, known to be dangerous and restrictive. In dealing with the two situations in *Falcone* and *Direct Sales,* the court said:

> "This difference is important for two purposes. One is for making certain that the seller knows the buyer's intended illegal use. The other is to know that by the sale he intends to further, promote and cooperate in it. This intent, when given effect by overt act, is the gist of conspiracy. While it is not identical with mere knowledge that another purposes unlawful action, it is not unrelated to such knowledge. Without the knowledge, the intent cannot exist. *United States v. Falcone, supra.* * * * Furthermore, to establish the intent, *the evidence of knowledge must be clear, not equivocal.* Ibid. *This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what, in that case, was called a dragnet to draw in all substantive crimes."* (319 U.S. at 711).

In the instant case the parties were dealing with the ordinary matters of their trade and occupations, not with contraband known to be illegal. Again the court's language in *Direct Sales* is most meaningful. The court said:

> "The difference between sugar, cans, and other articles of normal trade, on the one hand, and narcotic drugs, machine guns and such restricted commodities, on the other, arising from the latters' inherent capacity for harm and from the very fact they are restricted, makes a difference in the *quantity of proof required* to show knowledge that the buyer will utilize the article unlawfully. Additional facts, * * * which would be wholly innocuous or not more than ground for suspicion in relation to unrestricted goods may furnish conclusive evidence, in respect to restricted articles, that the seller knows the buyer has an illegal object and enterprise. Knowledge, equivocal and uncertain as to one, become sure as to the other.
>
> "The difference in the commodities has a further bearing upon the existence and the *proof of intent.* There may be circumstances in which the evidence of knowledge is clear, yet the further step of finding the required intent cannot be

A review of the evidence of the actions of MCA and Gerber from April 1, 1959, will clearly demonstrate that (1) their actions were not, in fact, consistent only with an unlawful or dishonest purpose; and (2) that if there was any existing conspiracy among the other Appellants, prior to, on, or after April 1, 1959, neither MCA nor Gerber had knowledge of the conspiracy nor any intent to join it, and that MCA and Gerber's conduct in relation to the other parties hereto was motivated and necessitated by their contractual and business relationships with Bardy. Clearly their acts were not consistent only with an intent to join in a conspiracy against Bardy.

C. The Evidence Does Not Support a Finding That MCA or Gerber on or After April 1, 1959, Entered Into or Joined a Pre-existing Conspiracy.

1. The Period From April 1 to June 2, 1959.

It bears repeating again that Bardy stipulated at the trial that both MCA and Gerber fully and faithfully performed all of their duties under the Bardy-MCA agency contract at least up to April 1, 1959 [Rep. Tr. 2354-2355]. The events occurring prior to April 1, 1959, have been summarized in detail in the *Statement of Facts, supra.* It need only be repeated here that the relationship between Bardy and Katleman had by April 1st become extremely explosive [Pltf. Exs. 186, 205, 267, 211, 213, 212, 217, 219; Rep. Tr. 230-236] and that despite Bardy's knowledge of Katleman's demands and of Katleman's threat to cancel the extension con-

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taken. Concededly, not every instance of sales of restricted goods, harmful as are opiates, in which the seller knows the buyer intends to use them unlawfully, will support a charge of conspiracy." (319 U.S. at 712) (Emphasis added).

How much less so where there is *no evidence of any agreement* between parties to ordinary business transactions to do anything wrongful. In such a case there is no knowledge and where there is no knowledge there can be no specific intent and no conspiracy.

tract [Rep. Tr. 1617, lines 17-20], Bardy did not communicate instructions to MCA or Gerber. Rather, for a period of approximately three weeks he carried on all of his disputes with Katleman through Holmes and Durieux, his representatives in Las Vegas, not through MCA or Gerber, and revealed only to those other representatives his plans and instructions regarding the promised replacements, the extension contract dispute, and what should be done in the event of a cancellation. All of this in spite of Gerber's letters of March 20, 1959 [MCA Ex. MW] and March 26, 1959 [Pltf. Ex. 475] requesting from Bardy information regarding the promised replacements and telling Bardy of Katleman's worsening attitude.

On April 1, 1959, Katleman demanded from Gerber, in writing, a statement as to whether Bardy had or had not made arrangements for the promised replacements [Rep. Tr. 2503-2509]. Gerber had just learned from Holmes of Bardy's provocative letter to Holmes saying that he would not send any replacements unless Katleman came to Paris to approve them, would agree to hold Bardy harmless, and pay the transportation costs [Pltf. Ex. 217, p. 3]. Gerber wrote Katleman on April 1, 1959, that to date he had not been able to get "anything definite" from Bardy about any of the replacements [Pltf. Ex. 222, p. 3]. When Gerber delivered the letter to Katleman he learned that Katleman, that same day, had obtained from Caire and Morrison letters stating that neither had made any agreement to remain with the show during the period of the extension agreement [Pltf. Ex. 222, pp. 2, 5]. Katleman told Gerber that in his opinion Bardy was guilty of an anticipatory breach of the extension contract because of his failure to send the promised replacements and to obtain contracts from or send replacements for Caire or Morrison. Katleman told Gerber that his purpose in obtaining the letters was to send them to AGVA so that the ques-

tion of the hotel's contractual relationships with Bardy's corporation could be acted on by the organization having jurisdiction over such disputes. An argument ensued between Gerber and Katleman as to whether there was in fact any anticipatory breach, with Gerber telling Katleman that he could not unilaterally declare a breach of a contract that was to commence eight days later [Rep. Tr. 2506-2514]. However, the same day Katleman wrote Jackie Bright of AGVA in New York, sending him the extension contract, Bardy's March 6, 1959 side letter, along with the letters obtained from Katleman, Caire, Morrison and Douglas. He requested that AGVA "justify" his position that there was an anticipatory breach [Pltf. Ex. 222, p. 1]. Gerber obtained copies of the Katleman letter to Bright, along with its enclosures, and sent them to Paul Sherman, MCA's house counsel in New York [Pltf. Ex. 477; Rep. Tr. 2503-2505] saying that as things stood between Bardy and Katleman there was not much hope for the show being held beyond April 7th, and that if AGVA upheld Katleman's position, there would be no choice but to go along with Katleman and close the show out [Pltf. Ex. 477].

At this point, are Gerber's acts any more consistent with a conspiracy than with the ordinary conduct of an agent confronted with an unhappy and recalcitrant hotel operator who is not satisfied with the agent's client? Should Gerber have lied and said the replacements had arrived or were guaranteed? By no stretch of the imagination could Gerber be said to be conspiring with Katleman. In Katleman's eyes, the deal had gone sour. Bardy had not performed as promised and Katleman was calling a breach. Was it incumbent *at that time* for Gerber, *at his peril,* to determine correctly what AGVA in an arbitration or a court at some future date might hold as to the rightness or wrongness of Katleman's position? Would it have been legally a

wrongful act of any sort even if Gerber agreed with Katleman? If he had agreed, would that be any more consistent with a charge of conspiracy than with the exercise by an experienced agent of his own judgment of the facts as he saw them? And even if that judgment were mistaken, he cannot be said to have conspired.

Is Gerber's conduct in sending Sherman the Katleman letters to Bright the "secretive" and "clandestine" act of a co-conspirator? Here is an agent on the scene in Las Vegas. His principal is in New York, nearly two thousand miles away, and his client is in Paris, nearly six thousand miles away. His client has been elusive, uncommunicative and uncooperative with full knowledge of Katleman's requirements, right or wrong. When Gerber is advised that Katleman intends to stop the show on April 8, 1959, he sends the full particulars to his legal department in New York. Again, is this the conduct of a conspirator? Is this conduct more persuasive of an inference that Gerber on April 1, 1959, was conspiring with Katleman than of the inference that he was concerned about his client and anxious to avoid trouble for him, as he testified? [Rep. Tr. 2503-2509]. Was there reason to be concerned? Gerber was not only the agent for Bardy personally, but also the person to whom the thirty-two members of the non-English speaking cast from Paris, looked for guidance and protection. Bardy was in Paris; Gerber was in Las Vegas with thirty-two people who might well be stranded, jobless and without means, if Katleman's threat were carried out on April 8. Bardy had sent Durieux, another representative, to Las Vegas just a few days before, and Gerber expected, as did Katleman, that Durieux would bring the promised replacements with him. This hope was frustrated when Durieux arrived without them [Rep. Tr. 2509]. Gerber's own statement of his reasons for feeling that he was forced to go along

with Katleman is enough in itself to negate any conspiracy notion [Rep. Tr. 2503-2509].

From April 1, when Katleman made known his threat to cancel the extension agreement on April 8, did MCA or Gerber commit any act consistent only with the inference that either or both were engaged in a conspiracy? Gerber testified without contradiction that in addition to sending a copy of his April 1st memorandum and attachments to Sherman, he sent the same documents to Stein in Paris, who was in contact with Bardy, he "hounded" Holmes and Durieux regarding the contract situation with Caire and Morrison [Rep. Tr. 2510, 2511; Pltf. Ex. 493], and attempted to convince Morrison that she should stay [Rep. Tr. 2510] but she refused for personal reasons and told Gerber that Bardy knew all about her situation [Rep. Tr. 2510]. He argued with and prevailed upon AGVA not to support Katleman's anticipatory breach theory [Rep. Tr. 2514-2515; 2142-2143]. Most importantly, within two or three days Holmes informed Gerber "not to worry, Mr. Bardy was on his way," that Bardy would stop in New York for a meeting with AGVA and would arrive in Las Vegas, Monday, April 6 [Rep. Tr. 2511]. Do Gerber's attempts to advise MCA's New York and Paris offices of Katleman's threat, his attempts to persuade Caire and Morrison to stay on, his hounding Holmes and Durieux, his arguing with and prevailing upon AGVA, reflect the actions of a man conspiring with Katleman against Bardy? Are they *more* consistent with a theory of conspiracy than with a theory of a frustrated agent caught in a difficult situation trying his best to keep his client's show going?

Bardy's letters of April 3rd to Gerber [Pltf. Ex. 232, 234] expressed a "willingness" to make necessary replacements if Katleman came to Paris, held Bardy harmless, and paid the transportation costs. He still made no mention of Caire's or Morrison's contracts, and stated

that if "La Nouvelle Eve" continued in the United States he would have no difficulty putting together a different troupe for the opening of his night club in Paris that summer.

Meanwhile, in Paris, David Stein received a copy of Gerber's letter of March 26, 1959 [Pltf. Ex. 475] and a copy of Gerber's letter to Paul Sherman of April 1, 1959 [Pltf. Ex. 477]. According to Bardy's testimony, he visited Stein's office on April 3, 1959 to discuss his problems with Stein [Rep. Tr. 1319-1322]. On April 6, 1959 Stein responded to Gerber's prior correspondence saying "We were completely amazed to receive your advice that Katleman was intending to get AGVA to go along with him, as a means of support, in order to gang up on Bardy, leave his troupe stranded without notice and closing them out without reaching any sort of agreement with Bardy to do this, notwithstanding the fact that Katleman has signed agreements which are in Bardy's possession, covering the extension." [Pltf. Ex. 478]. The incensed attitude of Stein is particularly noteworthy on the issue of MCA's alleged participation in any conspiracy. It is also worth noting that Stein's reaction to Katleman's April 1st threatened cancellation was the same as Gerber's—he can't do it "*unless* they actually did refuse to perform, which would then be a breach of Bardy's agreement to deliver a show." Stein, like Gerber, was of the opinion that if on April 8 Bardy did not deliver the show as promised with certain replacements, especially Caire and Morrison, there *probably would be* a breach of the contract. Even if Gerber and Stein were wrong in their lay opinions in this regard, such a mistake of fact or law surely cannot form the basis for an inference of participation in a conspiracy (*Landen v. United States,* 299 Fed. 75 (6th Cir. 1924); *Linde v. United States,* 13 F. 2d 59 (8th Cir. 1926)). Stein further said that he was at a loss to understand Gerber's statement that MCA would have to "go along with Katleman in view of the attitude of the

cast." Here it is clear that in Stein's view Katleman's position was untenable *unless* there was an actual breach by Bardy or his performers. Does Stein's statement "if Katleman really goes through with these strong arm methods . . . there will be plenty fur flying . . . to which I will not blame Bardy going to every length to secure damages" sound like the words of a conspirator against Bardy?

On April 6, 1959 by letter from Katleman to Gerber, Katleman exercised his option to have the show return for an engagement the following year [Pltf. Ex. 238] further demonstrating both Katleman's and Gerber's belief that Bardy would appear as he said he would and make good on his promises of replacements before April 8th.

April 8th came; Bardy and the replacements did not. The Hotel security guard advised the performers present that the show could not go on [Rep. Tr. 1224, lines 7-22; 2525, line 10, to 2518, line 17, 2519, line 18, to 2520, line 15]. Gerber's testimony regarding the events of that night is set forth in full in Appendix C herein. In summary, however, Holmes proposed that he go on for Janine Caire and sing "Oh, My Man I Love You So", and Jennife Till, a lesser dancer, would go on in Aleta Morrison's place. All of this was witnessed by Bardy's attorney, Russell B. Taylor, a Las Vegas attorney, hired by Bardy to "call the roll" [Pltf. Ex. 247] on April 8 and to witness the events [Rep. Tr. 1217-1221 to line 3]. Haettel of AGVA was also present, and Gerber asked him whether he would rule on whether there was a breach of contract. Haettel refused, preferring to wait for the arrival of Irvin Mazzei, Western Regional Director of AGVA, the next day [Rep. Tr. 2519, line 18, to 2520, line 15]. In place of "La Nouvelle Eve", Monique Van Vooran and Jack Wallace who went under contract to the Hotel, went on [Rep. Tr. 2535, line 25, to 2536, line 12].

Durieux cabled Bardy on April 8th of Katleman's position and that AGVA had declared the contract breached because the troupe was incomplete. Durieux advised Bardy to contact personally the AGVA representative in New York [Pltf. Ex. 244].

In the meantime, Caire, acting on the advice of her manager, Gregory, left Las Vegas on April 7 in the company of Gregory and Aleta Morrison who did not renew her contract with La Nouvelle Eve show [Pltf. Ex. 480, Rep. Tr. 405; Pltf. Ex. 534, Rep. Tr. 896]. Clearly under the law, Gregory, as Caire's manager, was privileged to advise her not to continue an existing contract or enter into a new one (*Imperial Ins. Co. v. Rossier,* 18 Cal. 2d 33 (1941); Restatement, Torts §§771-772). There is *no evidence* in the record indicating that either Gerber or MCA had any knowledge of or in any manner participated in these acts by Gregory, Caire and Morrison.

The very next morning, April 9th, Gerber sat down and wrote to Haettel, the AGVA representative, saying in part: "Enclosed herewith are copies of two letters which are English translations made by Peter Holmes of the two letters I received from Mr. Bardy, written in French. *These will perhaps help some in seeing both sides* of the picture concerning La Nouvelle Eve show at the El Rancho Vegas." [Rep. Tr. 2521]. The two letters from Bardy attached contained Bardy's complaints against Katleman [MCA Ex. MX]. Specifically these letters from Bardy took exception to Katleman's billing of costs against the show, blamed cast problems, Charles Henchis and stated Bardy's belief that Katleman was trying to punish Bardy for having left Las Vegas earlier without seeing Katleman. Here, then, on April 9, 1959, the day after Katleman refused to let the show go on and before AGVA had officially ruled on the question of breach, is Gerber, acting as agent for Bardy, placing Bardy's side of the story before the local AGVA repre-

sentative in *writing* so that the AGVA decision of the breach question could be made with Bardy's position before them. Again is this conduct consistent only with a theory of a conspiracy against Bardy? How could Gerber be a conspirator and Haettel not be? Isn't Gerber's conduct absolutely consistent with and doesn't it require a finding that Gerber was representing Bardy's interest the very best he could at the time *against* Katleman?

On April 9, Holmes tried to reach Bardy by telephone, in Mazzei's presence, but was told Bardy would not be available until the afternoon of April 10 [Rep. Tr. 2228, line 5 to 2230, line 25]. Gerber was informed the same day by Mazzei that "as far as he was concerned, a breach had occurred" and Mazzei instructed Gerber to arrange to return the troupe to Paris [Rep. Tr. 2522]. At that point Gerber wired David Stein in Paris advising him of AGVA's support of Katleman, AGVA's refusal to allow the troupe to play elsewhere, and expressing his disappointment that Bardy did not arrive as expected prior to April 8 [Rep. Tr. 2522, Pltf. Ex. 264]. Gerber saw no alternative to making arrangements for return of the troupe as Mazzei had directed. The same day, Bardy cabled Durieux that his representative would be in Las Vegas April 13th and told Durieux to be present with the troupe and a bailiff every night [Pltf. Ex. 260].

On April 9, 10 and 11, Gerber was in almost continuous meetings with Haettel of AGVA, Durieux and Holmes, Bardy's representatives, Henchis, the ballet director, and Katleman, trying to persuade Katleman to change his position on the contract so that the thirty or so stranded people could work [Rep. Tr. 2538]. In the interim, on April 10, Bardy sent Durieux a "confidential" cable saying that his representative would not arrive on the 13th, telling Durieux to return the troupe to Paris and to obtain a "discharge" from individuals

desiring to stay on after April 8 at the El Rancho Vegas [Pltf. Ex. 269]. This information was not conveyed to Gerber or MCA. Some 24 to 36 hours after the April 8 cancellation, Katleman said he would continue the show starting the following Wednesday "if a price adjustment was made in the show" [Rep. Tr. 2538]. Here again Gerber's conduct is entirely consistent with good faith efforts on behalf of Bardy and his troupe and not with any theory of conspiring with Katleman. As Gerber explained, since the other performers were working for AGVA scale, the only person who would be likely to take a reduction in income to preserve the show was Bardy. The suggestion was made by Katleman to Bardy's representatives, Holmes and Durieux, that Bardy agree to accept $2,000 a week during the extension period [Rep. Tr. 2538-2539]. Does Gerber's recommending that Bardy accept Katleman's $2,000 offer indicate bad faith on Gerber's part or establish that he was conspiring with Katleman? Not at all. The cancellation of the show was an accomplished fact which Gerber could not alter. Katleman's reason for making the new offer was the result of Katleman's own miscalculations. He had a new show ready to go in on April 8 when he refused to permit Bardy's show to go on. The replacement was the Monique Van Vooren show which caused "quite a bit of loss of business." [Rep. Tr. 2529]. "Katleman was complaining bitterly" about the show [Rep. Tr. 2529] and told Gerber that if an agreement could be worked out for the resumption of "La Nouvelle Eve" at a reduced rate with a reduced cast he might be able to recoup some of his loss from the substitute show [Rep. Tr. 2529]. Further, *if,* in fact, Katleman was in error on April 8 and there was not a breach, he faced the likely possibility of being sued for breach of contract in which event Bardy, and perhaps Gerber, as his agent, owed a duty to mitigate the damages from such a breach to the ex-

tent possible. An arrangement whereby all those desiring to work would be allowed to do so and whereby Bardy would receive $2,000 rather than nothing cannot be said to constitute evidence of a conspiracy. If it were, then any discussions looking toward an amicable settlement of differences or acts to mitigate damages would in every case constitute a conspiracy. Further, Bardy had told Gerber that he could easily put together another cast for Paris if the Las Vegas extension worked out.

In the interim, as noted above, on April 10, 1959, Bardy, in a "confidential" cable to Durieux said to return the troupe immediately [Pltf. Ex. 269]. Also on April 10, Gerber cabled Stein that the troupe would have to return [Pltf. Ex. 264] so that on that date, Gerber and Bardy were in agreement [Pltf. Ex. 264]. That this was not the end of Bardy's thinking on the matter is shown by the following exchanges.

Durieux agreed to call or cable Bardy regarding Katleman's new proposition. Durieux (who did not speak English) through Holmes, informed Gerber that he had spoken to Bardy and "Bardy was acceptable to the proposition" [Rep. Tr. 2539, lines 13-17]. That the Durieux-Bardy conversation took place seems established by Plaintiff's Exhibit 272, a cable dated April 11 from Bardy to Durieux (no copy to Gerber), saying "Impossible to give authorization to sign prior to confirmation of MCA requested by cable" [Rep. Tr. 2542]. That would indicate he was replying to word from Durieux of Katleman's offer. He did not say he refused the deal or did not approve it; he merely said that he would not authorize Durieux *"to sign"* his name on a contract until MCA confirms the deal. Bardy wired MCA at the same time saying: "Durieux informs me new proposition Katleman. Please confirm directly immediately by cable. Extremely important" [Pltf. Ex. 270, Rep. Tr. 2542]. Not a word of protest regarding the offer. That *same night,* April 11, 1959, Gerber sent

Bardy the confirmation wire he requested. He told Bardy that Katelman would pay all of the performers who wished to remain for the extension period, would pay Bardy $2,000, and said, "I respectfully advise you accept this proposition" [Pltf. Ex. 271, Rep. Tr. 2543]. He told Bardy that the modified agreement had been discussed with AGVA, Durieux and Holmes and that they "honestly feel this only solution" [Pltf. Ex. 271, Rep. Tr. 2843]. Not until the next day, April 12, did Gerber receive word from Stein in Paris that Bardy thought "The $2,000 offer 'disappointing' ". However, Bardy did not *then or ever* reject the offer [Pltf. Ex. 500] and never rejected it to Gerber. Gerber testified: "—the understanding that I had at that point was that Mr. Bardy had ok'd to Regis the extension period. . . ." [Rep. Tr. 2543]. ". . . I confirmed it to the El Rancho. . . ." [Rep. Tr. 2544]. "I must have either received a telegram or a cable or some word from Regis or Holmes" [Rep. Tr. 2544]. Gerber relied on the word of Bardy's representatives who purported to speak for him in accepting the offer [Rep. Tr. 2577-2578]. According to the testimony of Madame Deryckere, Bardy's ex-wife and continuing business associate, Bardy accepted Katleman's $2,000 offer and she cabled the acceptance [Rep. Tr. 1769-1770], corroborating Durieux' statement at the time that he had authority to accept.

That week the show went back into rehearsal [Rep. Tr. 2544]. There was a cast meeting at which the new plans were explained. Mazzei of AGVA ruled that the performers would have to be paid half salary for the week they were off, April 8-15 [Rep. Tr. 2545]. Alternatively, they could return to Paris. Some accepted the half salary paid by Katleman [Rep. Tr. 2665], others did not and returned to Paris. The show began under what all parties believed to be the modified extension agreement on April 15, less nine or ten performers [Rep. Tr. 2546]. Bardy was so advised by Durieux

[Pltf. Ex. 284]. On April 15, Gerber sent to Katleman a cost breakdown of the modified extension agreement [Pltf. Ex. 282].

Meanwhile, in Paris, Bardy was complaining to Stein that he had not been kept informed regarding the events that had occurred in Las Vegas and claimed that Gerber's cable of April 9 to Stein [Pltf. Ex. 501], was the first information he had that Katleman would cancel the show. This is, of course, in direct opposition to the previously cited and uncontroverted *documentary* evidence showing he had full knowledge of all the facts at least from March 25th on, and was directing his people how to act without informing Gerber. When Plaintiff's Exhibit 265, being a letter from Bardy to Stein dated April 10, 1959, is laid against all the previous evidence showing Bardy's knowledge of the events in Las Vegas, his statement to Stein "If I had been told about Katleman's decision I would have either accepted the new conditions or I would have on April 8 brought back my company" demonstrates that Bardy was being completely dishonest with Stein and was attempting to put MCA in the position of having withheld facts. Exactly the converse is true as the evidence makes clear—Bardy constantly withheld information from MCA. Further, Stein's April 10 memorandum to Gerber again demonstrates the differences between Stein and Gerber making the charge that they and their employer, MCA were engaged in a conspiracy completely untenable.

On April 14, 1959, Gerber wrote to Stein twice, once outlining the financial disputes as to charge-backs existing between Katleman and Bardy, indicating Gerber's continuing efforts to protect his client's interest [MCA's Ex. NA], and once explaining to him in full detail the events that had transpired in Las Vegas [Pltf. Ex. 493]. This document in and of itself dispels any inference that any person connected with MCA was any party to any conspiracy against Bardy. The very in-

ternal MCA disagreements and differences of opinion reflected in the series of exchanges between Gerber and Stein between April 10 and April 29 [Pltf. Exs. 482, 493, 483, 494, 294 and 497] regarding the Bardy-Katleman dispute point unerringly to the conclusion that MCA was not a party to any conspiracy against Bardy. First Stein relays Bardy's absurd accusation that Gerber "disappeared" during the crucial moments in and around April 7-8 [Pltf. Ex. 482]. Stein is critical of AGVA's position, finding it "just amazing". He describes the treatment given Bardy as "pretty rough stuff". He accuses Gerber of riding along with Katleman's "blows". Is this the way of a co-conspirator or one speaking for an alleged co-conspirator?

Consider, then, Gerber's indignant reply in which he demands an apology from Stein [Pltf. Ex. 493]. Gerber had indeed not disappeared during the crucial period. In fact, as he points out to Stein, he was spending a very substantial portion of his time on this matter, doing everything in his power to force Katleman and AGVA to accord Bardy proper treatment. All of the testimony of the persons on the scene support Gerber's presence at all times.

Again, on April 17, 1959, Stein wrote Gerber complaining of Gerber's handling of the Bardy-Katleman dispute [Pltf. Ex. 483]. It is obvious that he had not yet received Gerber's memorandum just referred to written three days earlier from Las Vegas. Again Stein points out specific objections he had to Gerber's conduct, especially Gerber's perhaps misplaced reliance on Bardy's representatives in Las Vegas—Holmes and Durieux.

When Stein received Gerber's April 14 memorandum, he replied on April 20, 1959 [Pltf. Ex. 494], saying: "If the information contained therein had been received many days earlier, and if we were kept up-to-date here on the many problems you were plunged in, I would certainly never have written you as I had. It is further

proof that, when we are separated by the distance as we are, and subjected to the harassment at our end as you were at yours, in the lack of receiving information and being kept up-to-date, we are too tempted to draw the conclusions." Regarding the new contract, Stein said: "I will await receipt of the final new draft" and "Either Bardy will sign or authorize Regis to sign on his behalf." It clearly appears that Bardy again agreed to the new contract in talks with Stein between the 15th and 20th of April, the date of Stein's memorandum. Stein further added that he would now be in a position to clarify MCA's activities with Bardy and his ex-wife, and expressed his apology to Gerber for having been so critical.

Yet, two days later, after Stein had explained the situation to Bardy and Bardy was still not placated, Stein again criticized Gerber's handling of the matter [Pltf. Ex. 294]. This complete lack of harmony in the matter as between these MCA representatives further dispels altogether the existence of a conspiracy by MCA. Equally it demonstrates that, even assuming Gerber acted erroneously, his acts were not ratified by MCA. Further, as of April 22, 1959, Bardy advised Stein that he contemplated legal action against all necessary parties [Pltf. Ex. 294]. Again Gerber, on April 28 [Pltf. Ex. 497] explained to Stein that he favored accepting Katleman's new contract for the April 15 show, saying: "Even though the extension arrangements were not in complete financial benefit for Bardy, I felt that it at least solved a problem of what to do with the company and also protected him (Bardy) from any claims from his own employees for the extension he contracted with them for and through no fault of their's was breached."

On May 1, 1959, Gerber advised Stein that an attorney, Robert Broder, representing a Mr. Kindler, was in Las Vegas and told Gerber that Kindler now

headed La Nouvelle Eve, rather than Bardy. Gerber further advised Stein that Durieux now took the position that he never had authority from Bardy to accept Katleman's new offer [Pltf. Ex. 496]. On May 5, Gerber again wrote Stein of Broder's visit and his claim that Katleman, AGVA and MCA had all acted improperly against Bardy. Gerber suggested that nothing could be done on the extension agreement until Kindler agreed or advised him "what new arrangements should be made." [Pltf. Ex. 495].

With the arrival and take-over of Bardy's affairs by Broder, Gerber and MCA ceased to act for La Nouvelle Eve other than to attempt to complete their accountings under the prior Bardy contracts with the Hotel. Broder had several meetings with AGVA and Katleman but to no apparent avail. On April 30, May 25 and May 26, 1959, Bardy cabled Durieux that it appeared impossible to work out the problems and that Durieux was to discuss the matter with Broder [Pltf. Exs. 304, 327, 370].

On May 14, 1959 [MCA Ex. NA] Gerber advised Sherman that Katleman refused to negotiate with anyone but AGVA regarding Bardy and monies MCA claimed were due Bardy.

Meanwhile, on May 6, 1959, Bardy filed suit in Paris against MCA, seeking annulment of the MCA-Bardy agreement and damages [Pltf. Ex. 309]. The modified version show ran its course under the extension contract which expired on June 2, 1959, and the troupe returned to Paris. Bardy took no action to enjoin the alleged wrongful use of his performers from April 15 to June 2, 1959.

There is therefore not a shred of evidence to support the conspiracy verdict and judgment against MCA or Gerber during the period just reviewed.

2. The Period From June 2 to October 21, 1959.

Bardy's decision to terminate his agency contract with MCA on May 6, 1959, did not however abate his quest for revenge on MCA and Gerber. Taking facts occurring after June 2, 1959—facts which neither MCA nor Gerber could control and in which they had no participation, Bardy attempts to weave the web of conspiracy to extend it to the return of the Charles Henchis line of girls to the El Rancho Vegas Hotel on July 29, 1959, and the run of the Henchis dancers there until October 21, 1959. Three-fifths of the alleged injurious results of the claimed conspiracy occurred during this period, when MCA and Gerber were completely out of the picture.

The evidence establishes the following events: When the modified extension contract for "La Nouvelle Eve" expired on June 2, 1959, the personnel of the show returned to Paris [Rep. Tr. 2036]. When they arrived in Paris, Bardy's club was closed for repairs [Rep. Tr. 2039-2040]. Henchis, owner of the Charley Ballet which had been a part of the "La Nouvelle Eve" show in Las Vegas contacted his lawyer to determine what his rights were against Bardy, who could not be located [Rep. Tr. 2040-2042]. Henchis was told by people in Paris that Bardy would not reopen the club because of tax problems [Rep. Tr. 2048].

Henchis testified that he was advised by Matt Gregory, his personal manager, that he could obtain employment for the Henchis line of girls in Las Vegas and elsewhere when they were free to work [Rep. Tr. 2041]. When the Paris club was closed and Bardy appeared unable to provide employment for the Henchis dancers, Gregory flew to Paris to negotiate a contract with Henchis and Henchis signed a contract with Gregory [Pltf. Ex. 334] agreeing to return to the United States for bookings. This contract was dated June 8, 1959 but signed later [Rep. Tr. 2328]. It was

solely between Gregory and Henchis, with no knowledge or participation by Gerber or MCA.

Sometime between June 8, 1959 and July 29, 1959, Gregory booked the Henchis line of girls into the El Rancho Vegas Hotel, not as the major attraction but as an act on the bill with the star of the El Rancho show for that period, Joe E. Lewis [Rep. Tr. 2051, 2700]. Gregory testified that he originally hoped to put the line in the Sahara Hotel, but was not able to do so [Rep. Tr. 2334]. Again there is no evidence of any knowledge or participation in these acts by MCA or Gerber. The Henchis dancers, featuring "Les Girls de Paris" opened at the El Rancho July 29, 1959, under the title "La Nue Eve" and played through October 21, 1959.

MCA did not book this show; MCA did not receive any commission on this show; MCA did not participate in any form or manner in the arrangements between Henchis, Gregory and Katleman, whatever their rights, duties and morality might have been [Rep. Tr. 2551]. MCA had nothing to do with the selection of the title "La Nue Eve." In fact, as indicated above, MCA was being sued by Bardy in Paris at the time and would certainly not have participated in any scheme to cause damage to Bardy.

Plaintiff makes a feeble effort to connect Gerber and as a consequence, MCA, to this period of the alleged conspiracy by two widely remote, immaterial and irrelevant pieces of evidence. First, Gerber was told by Katleman at some point in July 1959, that the dance numbers in the Henchis line of girls were lackluster and there was a need for a choreographer [Rep. Tr. 2551]. MCA had a client, Paul Godkin, a choreographer, and in the performance of his duties as a talent agent (MCA represented many artists in the entertainment industry) Gerber sent Godkin to the El Rancho where he was employed for one week to work to improve the dance numbers [Rep.

Tr. 2550]. Under plaintiff's theory, Gerber and MCA, knowingly and intentionally, risked the imposition of substantial damages in the already pending and in this subsequent litigation by getting employment for another client of their's with the El Rancho Vegas Hotel. Plaintiff's theory apparently is that MCA was forever barred from seeking employment for any of its other clients at one of the six or so establishments using talent in Las Vegas at the pain of being charged with conspiracy against Bardy.

Second, plaintiff introduced wholly irrelevant and immaterial evidence that MCA as a talent agent, and Matt Gregory, as a personal manager, had a mutual client in Shaw-Hitchcock Productions, who otherwise had absolutely nothing to do with this case. The bare fact in evidence is the existence of this mutual client, a client which Gregory had represented at least *prior to* January, 1959 [Rep. Tr. 2343] and that MCA had represented prior to the Bardy affair. The exhibits themselves show that there was anything but harmony between Gregory and MCA regarding bookings for Shaw-Hitchcock [Pltf. Ex. 368 A]. Under no circumstances could the naked fact of a mutual, remote-to-the-situation-at-hand client be any evidence whatsoever of a conspiracy as to Bardy.

There is, therefore, no evidence whatever to link Gerber, let alone MCA, to any conspiracy in the period from June 2, to October 21, 1959. Since the very substantial verdict in this case must certainly have rested in substantial part on the three alleged acts by Katleman which occurred during this period, the verdict against Gerber and MCA cannot stand.

D. If There Was Any Conspiracy Established by the Evidence, There Were Two Conspiracies and the Single Conspiracy Verdict Cannot Stand.

If there was, in fact, any "conspiracy" in this case (and the facts conclusively show there was not as to MCA and Gerber), then clearly there were two conspiracies, one ending on June 2, 1959 with the end of the extension contract, and the other commencing on or after that date. Even if by indulging in suspicion and surmise, in guilt by association and in the pernicious doctrine of "implied conspiracy", Gerber and MCA be charged argumentatively, although not factually, with having been said to have been a party to the first conspiracy, there is not a shred of evidence to show their knowing and wilful participation in acts alleged to have caused damage to plaintiff after June 2, 1959. And it was upon such claimed damage after June 2, 1959, that most of the gigantic sum awarded to Bardy had to be based.

Every conspiracy has a "party dimension" and an "object dimension." Thus A, B and C may agree to operate "Murder, Inc.", pursuant to which they agree that the organization will supply, on a continuing and undiscriminating basis, killers for hire. Such a conspiracy is one of indeterminate "object dimension" and anyone subsequently entering the organization with knowledge of its purpose "takes his chances" with respect to who will be murdered, where and how (See *United States v. Andolschek,* 142 F. 2d 503, 507 (2nd Cir. 1944) (L. Hand, J.)). On the other hand, if A, B and C conspire to illegally receive a shipment of narcotics and B, C and D illegally conspire to receive another shipment of narcotics, a single conspiracy count against A, B, C and D, with proof of the two separate acts violates the "party" and the "object" dimension concept as to A, who was

not, in fact, a party to the second agreement and as to D who was not a party to the first.

These rules of law are basic both as to the law of and to the requirements of proof in conspiracy cases and were clearly enunciated by the United States Supreme Court in *Kotteakos v. United States* (328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557) (1946)). In that case numerous defendants were convicted of a single conspiracy to violate the National Housing Act (12 U.S.C. §1702, *et seq.*), based on numerous acts of fraud in obtaining government loans. One defendant was the "hub" of the group who acted through numerous "spokes" to obtain the loans. The government charged a single conspiracy consisting of the acts of A (the hub), and the multiple overt acts of C, D, E, F, etc. There was no proof, however, that C, D, E & F agreed to or had knowledge of A's continuing acts through each of them to obtain fraudulent loans. In such a case, the court held that there was not proof of a single overall conspiracy, but merely proof of numerous separate conspiracies and a verdict based on a single count could not stand. As the court said, the wrongful act

> "must be in furtherance of the common plan; there can't be three or four different plans. There must be one plan and all of them must bear their part." (328 U.S. at 766, N. 21).

Further, the court held that the error was *not* cured by an instruction which told the jury that in order to convict it had to find "one conspiracy" and that the government had to prove

> "each of the defendants was a member of that conspiracy. . . . the question is whether or not each of the defendants or which of the defendants are members of that conspiracy." (328 U.S. at 767).

The jury following this instruction found each defendant guilty as a party to an overall single conspiracy,

despite the fact that this was not *clearly and unequivocally* established by the evidence. The Court said of such an instruction that it

> ". . . obviously confuses the common purpose of a single enterprise with the several, though similar, purposes of numerous separate adventures of like character." (328 U.S. at 769).

The problem, the Court noted, is that

> "Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application. * * * [Conspiracy charges] call for use of every safeguard to individualize each defendant in his relation to the mass." (328 U.S. at 773).

Under the court's instructions to the jury in the instant case, the existence of a single alleged conspiracy was presented, having as its ends and purposes five allegedly damaging acts. Those acts were (1) causing a breach of contract between the hotel and La Nouvelle Eve show for an eight week's extension of the show from April 8 to June 2, 1959; (2) causing public confusion as to the source of a production bearing the title "La Nue Eve" from July 29 to October 21, 1959; (3) injuring the reputation of the trade name La Nouvelle Eve by the presentation of a different class of performance from July 29 to October 21, 1959, under the title "La Nue Eve"; (4) depriving plaintiff of the services of his performers during the same period and (5) causing breach of the agency contract between plaintiff and MCA Artists, Ltd.

There can be no question, even under plaintiff's distorted statement of the law of conspiracy, that to support a verdict of a single conspiracy, the jury must have been able to find by clear and unequivocal evidence that the defendants MCA and Gerber knowingly agreed with the other defendants, or at least one of them, to do the five acts charged *as a part of a single plan;* otherwise the object dimension of the alleged conspiracy is frag-

mented and there is no single conspiracy. As the court said in *United States v. Aqueci* (310 F. 2d 817 (2nd Cir. 1962)) "the nature of the enterprise determines whether the inference of knowledge" of the overall plan is justified. Where, as here, the acts of the defendants are far more consistent with the ordinary business motives of each than with any intention of conspiracy and where, as here, the alleged wrongful acts by defendants MCA and Gerber can at most be said to constitute an unintentional violation of their agency contract, the language of the Supreme Court in the *Kotteakos* case, *supra,* is particularly compelling. Where one group of defendants are found to have committed one wrongful act and another group some other wrongful act, the Court said:

> "The dangers for transference of guilt from one to another across the line separating conspiracies, subconsciously or otherwise, are so great that no one can say prejudice to substantial rights has not taken place." (328 U.S. at 774).

The right of defendants in such a case, the Supreme Court has said

> "was the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others as shown by this record." (328 U.S. at 775).

To convict of a single conspiracy charging multiple wrongful acts, there must be clear and unequivocal proof that the original plan encompassed "the entire chain of events." (See also, *Twitchell v. United States,* 313 F. 2d 425 (9th Cir., 1963); *Montford v. United States,* 200 F. 2d 759 (5th Cir. 1952); *Brooks v. United States,* 164 F. 2d 142 (5th Cir. 1947); *United States v. Stromberg,* 268 F. 2d 286 (2nd Cir. 1959)).

There is no evidence whatsoever to support a finding by the jury that at any time MCA and/or Gerber en-

tered into an agreement encompassing "the entire chain of events" consisting of the five wrongful acts submitted to the jury as the "scope of the conspiracy."

With the facts above stated in mind, there is another reason why the verdict of conspiracy cannot stand. The court erroneously and over the continued objection of counsel for defendants led the jury to believe that conspiracy is a tort in and of itself and that plaintiff need not prove the commission of underlying tortious acts [Rep. Tr. 3088; 3108]. Yet the court proceeded to instruct the jury on five alleged independent torts done pursuant to a conspiracy, the alleged commission of each of which resulted in damage to plaintiff. In that confused and confusing state of the instructions, the jury brought in a general verdict on conspiracy against all but two defendants, assessing $251,200 in compensatory damages and $225,000 in punitive damages. Since the conspiracy as such was not or could not be the tort, the jury had to have before it clear and convincing evidence that each of the Appellants committed each of the tortious acts alleged to have been committed pursuant to the conspiracy. If, as Appellants contend, there is no evidence to connect MCA or Gerber with three of the five alleged tortious acts, and if the damages for those two could not exceed $46,000, it is patently obvious that prejudicial error was committed.

Taking first the Nevada law applicable in a diversity case, the present case is controlled by the decision of the Nevada Supreme Court in *Heinen v. Heinen* (64 Nev. 527, 186 P. 2d 770 (1947)). That was a divorce action in which there were some five grounds alleged to entitle plaintiff to a divorce. The verdict was clearly supported by substantial evidence as to four counts, but there was error as to the fifth. The case thus posed what the court referred to as "the two issue rule" on which, admittedly, there is substantial conflict of authority in various jurisdictions. According to one line of authorities, the court

noted, a substantial error affecting any one of the issues or theories in a case in which a general verdict has been rendered will be regarded as prejudicial "unless the verdict is so clearly supported by the evidence upon an issue or theory as to which no error occurred that the trial court would have been justified in directing a similar verdict thereon. At least this is true *if it is impossible to determine upon which of the issues the verdict was founded.*" (186 P. 2d at 777). Another line of cases holds to the contrary and states that if there is any ground to support the verdict that is sufficient. After reviewing the contrary authorities, the Nevada Supreme Court said:

> ". . . where two or more material issues are tried and submitted to the jury and the verdict is a general one, it cannot be upheld if there was error as to any one of the two or more issues. The reasoning of the cases supporting this rule appears to us to be the better logic . . ." (186 P. 2d at 777).

It cannot be considered "harmless" where it is impossible to determine on which theory or issue the jury based its verdict if any one theory is not supported and the verdict is a general one.

The same rule is followed by the federal courts in non-diversity cases (*Volacco Prods. v. Lloyd A. Fry Roofing Co.,* 308 F. 2d 383, 393 (6th Cir. 1962); *Roth v. Swanson,* 145 F. 2d 682 (8th Cir. 1944); *National Wrestling Alliance v. Myers,* 325 F. 2d 768 (8th Cir. 1963); 3 Barron & Holtzoff, §1034 N. 40). Thus regardless of whether this be treated as a diversity case or one under the Lanham Act, the rule is the same and Appellants are clearly entitled to a new trial.

From all of the foregoing it is clear as to MCA and Gerber that the evidence shows (a) no conspiracy at all, or, ignoring such lack of evidence, (b) a "conspiracy" to breach the extension contract and/or the Bardy-MCA agency contract, but (c) no evidence whatsoever

to establish that either MCA or Gerber conspired with anyone else (1) to use the name "La Nue Eve," (2) to damage the reputation of "La Nouvelle Eve" by use of the title "La Nue Eve" or (3) to deprive Bardy of his performers. Under the general rule of conspiracy as stated, under the "two conspiracies" rule, and under the "two-issues" rule the general conspiracy verdict cannot stand.

VII.

THE CONSPIRACY VERDICT AGAINST MCA ARTISTS, LTD., A CORPORATION, IS CONTRARY TO LAW AND NOT SUPPORTED BY THE EVIDENCE.

The District Court properly instructed the jury that since certain of the appellants were corporations, it was necessary for Bardy to prove that the corporations' agent knowingly and wilfully participated in the unlawful plan with authority [Rep. Tr. 3190-3193]. The court instructed the jury to determine as to Gerber,

> ". . . whether he had previous authority or whether the corporation subsequently knew of his conduct; if his conduct was unlawful, whether the corporation later approved it.
>
> "So you have two possibilities here as far as authority of an agent is concerned. Did the corporation authorize him to do an unlawful act, if you find he did one, or did the corporation subsequently, with knowledge that he had done the unlawful act, ratify, as we say approve it?" [Tr. 3193].

If, contrary to all of the facts, but for the sake of argument Gerber, stipulated to be an employee of MCA, entered into or became a party to conspiracy, it was conceded in the Trial Court that there was no evidence "of any prior authorization by any corporation to an agent to do an unlawful act." [Rep. Tr. 3194]. The Dis-

trict Court therefore instructed the jury regarding the alleged conspiracy that "the question is, under the circumstances, was there subsequent ratification of it by the corporation with knowledge of what the agent had done?" [Rep. Tr. 3194].

There can be no real question that if in fact Gerber knowingly and wilfully entered into a conspiracy against Bardy, a client of MCA's, such conduct would not be authorized conduct or conduct within the scope of his employment (*Ransom v. Dollar Steamship Line,* 2 F. Supp. 409 (W.D. Wash. (1933) (Conspiracy is not within the scope of employment)). Thus the court properly instructed the jury that in order to hold MCA liable for conspiracy it would have to be on the basis that MCA ratified Gerber's acts (*J. C. Penney v. Gravelle,* 62 Nev. 434, 155 P. 2d 447 (1945)).

Ratification can be inferred only from acts which evince an intention to ratify in a clear and unequivocal manner (*United Mine Workers of America v. Coronado Coal Co.,* 259 U.S. 344, 42 S. Ct. 570, 66 L. Ed. 975 (1922)). It may not be inferred from acts which may be readily and satisfactorily explained without involving any such intention (*J. C. Penney v. Gravelle, supra; Miera v. George,* 55 N.M. 535, 237 P. 2d 102).

Furthermore, knowledge by the corporate defendant of all of the material facts must be present before ratification can be found. In a case of this nature wherein the evidence establishes merely that certain other employees had knowledge of certain of the acts of Gerber by virtue of inter-office memoranda, cables, etc., there is nothing to establish knowledge on the part of the corporation of the alleged conspiracy (*Mann v. Life and Casualty Insurance Co. of Tenn.,* 129 S.E. 79 (S.C.); *Williams v. The Pullman Palace Car Co.,* 3 So. 631 (La.). Nor does, the mere retention in employment of an employee who committed a tort constitute sufficient evidence of ratification. On that issue, there can be no

doubt that this case is controlled by *J. C. Penney Co. v. Gravelle, supra*), wherein (a) the employer had full knowledge and (b) retained the tortfeasor employee in his job with the court holding that such acts did *not* constitute ratification. Clearly MCA, even with full knowledge of all the facts, could retain Gerber, defend itself in a law suit and never ratify any alleged wrongful act under Nevada law (see also, *Sullivan v. Matt,* 130 Cal. App. 2d 134 (1955)).

It bears repeating that the conduct of the other MCA agents, the conduct of the corporate principal and of all others involved, is perfectly consistent with a reasonable belief in the honesty of Gerber as an agent, with a reasonable belief that if any contractual rights of Bardy had been breached they could and would be rectified by Bardy in an action against Katleman for breach of contract and against MCA for breach of contract, without the remotest hint of a conspiracy. It was incumbent upon plaintiff, under the law, to prove that the conduct of MCA, the corporate principal, was consistent *only* with an intention to ratify and adopt Gerber's alleged conspiracy. There is no such evidence and no evidence even to support such a remote inference.

It is well established that ignorance of the facts or of the law or ignorance of the legal consequences of one's acts *is a defense in conspiracy.* Conspiracy is a tort in which specific intent is necessary. It is not enough to agree to do an act which is unlawful; *the unlawfulness must be known* to the conspirators. Thus in *Landen v. United States* (299 Fed. 75 (6th Cir. 1924)) a conspiracy conviction based on the violation of a liquor license law was reversed where defendants did not know of the permit requirement. In *Commonwealth v. Benesch* (290 Mass. 125, 194 N.E. 905 (1935)) the court held that the fact that the defendants charged with conspiring to violate the state's blue-sky laws did not know the legal consequences of their

act was a complete defense to the conspiracy charge. A mistake of or ignorance of such legal consequences is therefore fatal to a conspiracy verdict. (See also, *Pettibone v. United States,* 148 U.S. 197 (1893) (the recipient of a stolen car, *even if he has reason to believe it is stolen,* cannot be convicted of conspiracy to violate the National Motor Vehicle Theft Act if he knows nothing about the interstate transportation of the car); *Linde v. United States,* 13 F. 2d 59 (8th Cir. 1926)).

From the foregoing it is clear that there was no evidence whatsoever of any ratification of any alleged conspiracy by MCA, the corporate principal of Gerber.

VIII.

THE DAMAGES AWARDED ARE CONTRARY TO LAW, NOT SUPPORTED BY THE EVIDENCE AND ARE GROSSLY EXCESSIVE.

A. The Award of $251,200 General Damages Violates the Rule Against Remote and Speculative Damages.

On the conspiracy count involving MCA and Gerber, the jury awarded compensatory damages in the amount of $251,200.00 and punitive damages in the amount of $225,000.00 for a total of $476,200.00. Such damages have no support in the record, are excessive and could only have resulted from prejudice.

The damages claimed by Bardy and found by the jury are wholly speculative. The entire price for the use of the title, production numbers, costumes, and other elements of the show was clearly established by the prior dealings between the parties and Bardy's loss, if any, by an act of any of the parties to the alleged conspiracy could not exceed Bardy's net under the established contract price. Further, Bardy had given El Rancho an option on the show, which was accepted, for the following year, at the *same net to him* [Pltf. Ex. 238]. Certainly

the only basis for liability and the best evidence on the question of damage, if any, to Bardy is the contract and the established contract price. It is clear, as a matter of law, that Bardy's first allegation of damage pursuant to the alleged conspiracy arising from a purpose of the alleged co-conspirators to "(1) violate and use Bardy's property rights by Katleman's presentation of the show 'La Nouvelle Eve' from April 8 to June 2, 1959, the period of the executed extension agreement" [Rep. Tr. 3090] could result only in a *contract theory* of liability and damages. In *Bupp v. Great Western Broadcasting Corp.* (201 Cal. App. 2d 580 (1962)), plaintiff, a television announcer, brought an action against his former broadcaster employer alleging that, after the term of his employment, video-tape recordings made by plaintiff were used by the employer without the consent of and without payment to plaintiff. The suit, in addition to an action for breach of contract, claimed unfair competition and defamation. In sustaining the trial court's dismissal of the latter two causes of action, the court held that where the parties have contracted with respect to the subject matter, a breach does not give rise to any theory of relief other than on the contract, and the contract provides the measure of damage, if any. (Accord: *Lillie v. Warner Bros. Pictures, Inc.* (39 Cal. App. 724 (1934)).

On the original contract with El Rancho Vegas, Bardy claimed he was to *gross* $15,000.00 per week [Pltf. Ex. 90] but that was in constant dispute by Katleman, who claimed that transportation costs to and from Paris were to be paid out of Bardy's share [Rep. Tr. 2421-22]. Under the extension agreement Bardy was to *gross* $5,000.00 per week for eight weeks [Pltf. Ex. 472]. Therefore, even if liability were established, which the evidence does not support, Bardy's damages under the extension agreement which he alleges was breached would be, at best $40,000.00 gross.

And under the contract price, it is doubtful whether Bardy was entitled to all or any part of the $5,000.00 per week payable to him under the contract. The very procurement of numerous "assignments" by Bardy from others claiming an interest in "La Nouvelle Eve" [see Pltf. Exs. 426, 419, 415, 438 and 439] after commencement of this action makes it clear that Bardy was not legally entitled even to the full $5,000.00 from the contract. (See the argument on Assignments in Co-Appellants' Brief).

That the contract price is the appropriate measure of damages in an action such as this is evident from the following factors making any other measure inadmissibly speculative: *First,* there was no evidence introduced to show Bardy's past profit experience, if any, with the title "La Nouvelle Eve" which had been used by him as the name of his Paris club, not as the title for a show [Rep. Tr. 2862, lines 17-20]. *Second,* the show which became "La Nouvelle Eve" in Las Vegas was called "Shocking" in Paris and elsewhere in Europe and was not financially successful [Tr. 2071, 2089, 2076, 2082]. In fact there was a great deal of trouble with it in places like Dusseldorf [Tr. 1527, 1533]. *Third,* the show could not play elsewhere in the United States after Las Vegas because of Guild restrictions [Pltf. Ex. 509]. *Fourth,* Bardy's own associate, Peter Holmes, wrote to Bardy a week after the extension period began advising Bardy that the show was much better and that Bardy's reputation was saved [Pltf. Ex. 292]. Henchis testified that Bardy's later shows in Paris were not financially successful [Rep. Tr. 2076, 2092]. *Fifth,* the personnel of the show who remained in Las Vegas after the expiration of the original contract and through the extension contract were not essential to Bardy's continued use of the title in Paris, since he stated [Pltf. Ex. 232] he could run two shows under that title. *Sixth,* although the Charles Henchis

Dancers were allegedly obligated to return to Paris at the expiration of the original contract on April 7, 1959, had there not been an extension period, the evidence establishes that Bardy's Paris club was closed and undergoing repairs at least until the 27th of July [Tr. 803] and that he would have had to obtain employment elsewhere for his people for a considerable period of time [Tr. 802, 2039]. *Seventh,* Bardy never offered any evidence to show that he made a profit from the Las Vegas run of "La Nouvelle Eve" during either the original or extension contract [Rep. Tr. 2862, lines 17-20]. The Ninth Circuit has repeatedly cautioned against giving "judicial blessing to a decision based upon speculation, surmise and conjecture." (*Wolfe v. National Lead Co.,* 225 F. 2d 427 (9th Cir.); *Flintkote Co. v. Lysfjord,* 246 F. 2d 368, 395 (9th Cir.). Any award of damages over and above $40,000.00 could be based on nothing other than speculation, surmise, conjecture and prejudice.

Moreover, in Las Vegas and in the United States as a whole, Bardy's was a *new business,* without experience, without a history and without a basis upon which to calculate damages even if the business were *totally* destroyed—which it was not. The classic statement of law on the right to recover lost future profits is found in *Grupe v. Glich,* 26 Cal. 2d 680, 160 P. 2d 832 (1945), later adopted by the Nevada Supreme Court in *Knier v. Azores Constr. Co.,* 78 Nev. 20, 24, 368 P. 2d 673 (1962). In the *Grupe* case, the court states the rule as follows:

> . . . *where the operation of an unestablished business is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative* . . . (26 Cal. 2d at 692-693). (Emphasis added).

Where, as in the case at bar,

> ". . . a new business or enterprise is engaged in, and damages by way of profits are sought for its interruption or prevention, the rule is that *they will be denied for the reason that such business is an adventure as distinguished from an established business,* and its profits are speculative and remote, existing only in anticipation. . . ." (Emphasis added).

Handley v. Guasco (1958), 165 Cal. App. 2d 703 at 712, 332 P. 2d 354; *Mahoney v. Founder's Ins. Co.,* 190 Cal. App. 2d 430, 12 Cal. Rptr. 114 (1961); *Hendrick v. Perry,* 102 F. 2d 802 (10th Cir. 1939).

In adopting the same rule, the Nevada court held that where one has been in business in one place and then moves to another, the loss of anticipated profits in the new location must be considered separate and apart from experience in a prior location. The business becomes a new business when the location is changed. (*Knier v. Azores Constr. Co., supra;* see also *Alper v. Stillings,* 80 Nev. 84, 389 P. 2d 239 (1964). In the instant case, Bardy's Societies may have had an established business in Paris with the operation of La Nouvelle Eve nightclub, but his Las Vegas sojourn was "an adventure" standing on its own experience. It was conceded to be an unknown business in the United States until the show opened in Las Vegas [Tr. 997, 1014]. Thus, any award based on loss of future profits, was erroneous and could only have been based on sheer speculation.

Since, as shown earlier herein, neither MCA nor Gerber was a party to any conspiracy against Bardy, the very most that MCA and Gerber could be liable for would be those damages, if any, proximately caused by some alleged breach of the MCA-Bardy agency agreement. If, in fact, MCA and Gerber breached their contract with Bardy, the only damage to which Bardy

would be entitled would be to recover the commissions paid to MCA on the extension contract, amounting to approximately $6,000.00. Being purely an action for breach of contract, punitive damage would not be recoverable. (*Coca Cola Co. v. Dixie Cola Labs.*, 155 F. 2d 59 (Cir. 1946), *cert. den.*, 329 U.S. 773, 67 S. Ct. 192, 91 L. Ed. 665 (1946)).

B. There Is No Basis in Law or in the Evidence to Support an Award of Damages to the Title "La Nouvelle Eve".

Even if, with no factual support, it was to be found that Gerber and MCA were liable for the acts of other Appellants in their use of the title "La Nue Eve" from July 29 to October 21, 1959 for the Charles Henchis line of girls, there is still no substantial evidence of liability in such use and no substantial evidence to support an award of damages.

1. The Damages Claim Based on the Allegation of Trade Name Infringement Under the Lanham Act Is Not Supported by the Evidence and Is Contrary to Law.

In the trial of this action Bardy made an election to rely on the Lanham Act [15 U.S.C. §1121, 1126(b)(g)-(h); Clk. Tr. 1824] for his theory that one of the purposes and one of the actionable results of the alleged conspiracy was to cause public confusion and injury to the reputation of his alleged trade name, "La Nouvelle Eve" [Rep. Tr. 3119-3123, 3201-3202]. Did Bardy have a protectible "trade name" under the Lanham Act?

It is conceded that "La Nouvelle Eve", as allegedly used in commerce in the United States, was used solely as the title of the show Bardy brought to Las Vegas from Paris, where it was titled "Shocking." In Paris, "La Nouvelle Eve" was the name of a club owned by "Masart," a French corporation and leased to various societies [Rep. Tr. 1403-1404]. Further, the title "La

Nouvelle Eve" was not registered in the patent office of the United States and Bardy's claim for protection must therefore come within the provisions of 15 U.S.C. §1126(g) providing protection for "trade names or commercial names" *owned by* persons whose country of origin is a party to a convention or treaty "without the obligation of filing or registration."

While the Lanham Act relieves such foreign nationals of "the obligation" of registering trade names on the principal or supplemental register, the law presupposes that marks or names *are capable of registration* even though the obligation to register is waived. Was "La Nouvelle Eve" capable of registration under the Lanham Act? Was it a "trade name" within the meaning of this Act?

The answer is clearly that it was not capable of registration. Its only use by Bardy was as the title for the production staged in Las Vegas. The law uniformly holds that titles may not be registered and are not protectible under the Lanham Act as trade marks or trade names (*Application of Raymond K. Cooper,* 254 F. 2d 611 (C.C.P.A. 1958)). In the *Cooper* case, *supra,* an attempt was made to register under the Lanham Act "Teeny-Big", the title of a book. Affirming the Examiner's refusal to register the title the court held that a title cannot be a trade mark or a trade name because "however arbitrary, novel, or non-descriptive of the contents the name of a book—its title—may be, it nevertheless describes the book" (254 F. 2d at 615. See also *International Film Services Co. v. Associated Producers,* 273 Fed. 585 (S.D. N.Y. 1921); *Downes v. Culbertson,* 275 N.Y. Supp. 233 (1934)).

Since the title "La Nouvelle Eve" could not qualify as a "trade name" under the Lanham Act and would be protectible, if at all, only under the Nevada State law of unfair competition and, since Bardy elected to proceed under the Lanham Act and to waive State law pro-

tection, there could not have been any *legal injury* to any legally protected interest in the title "La Nouvelle Eve." Clearly there can be no conspiracy to do injury to a *non-existent* right. At most Bardy had what has been referred to as a "naked" claim for unfair competition and it is clear that those portions of the Lanham Act relied on by Bardy provide no remedy for such a claim (*Shaffer v. Coty, Inc.,* 183 F. Supp. 662, 664 (S.D. Cal. 1960)); *Chamberlain v. Columbia Pictures Corp.,* 186 F. 2d 923, 9th Cir. 1951).

As is more fully developed in the brief of Appellants, Elranco, Inc., *et al.* herein, the title "La Nouvelle Eve" was never, in fact, used as a trade name by Bardy either in the United States or in France. This is, of course, an additional reason for there being no basis for a recovery of damages under the Lanham Act.

Even if Bardy had not elected to rely on the Lanham Act, and had, in a diversity situation, elected to rely on the Nevada law, the result would be no different. The Nevada laws' definition of and protection for trade names is such that, as pointed out in the brief of the other Appellants, Bardy's mere *title* would not qualify as a trade name. Protection, if any, therefore, under State law would have to be grounded in the state law of unfair competition. There are no comparable Nevada cases but it is clear that on the facts presented here, the state law of unfair competition could not be extended to give protection to and damages for an alleged injury to the title "La Nouvelle Eve."

Under the decisions of the United States Supreme Court in *Sears, Roebuck & Co. v. Stiffel* (376 U.S. 225, 84 S. Ct. 784, 11 L. Ed. 661 (1964)) and *Compco Corp. v. Daybrite Lighting, Inc.* (376 U.S. 234, 84 S. Ct. 779, 11 L. Ed. 669 (1964)), state laws of unfair competition are restricted to cases of *palming off* and *false labeling* under state statutes so providing (376 U.S. at 272. See also, *Cable Vision, Inc. v. KUTV,*

335 F. 2d 348, 350-351 (9th Cir. 1964), cert. den., 379 U.S. 989, 85 S. Ct. 700, 13 L. Ed. 2d 609 (1964)). As will be demonstrated in the following pages, Bardy did not prove any of the elements necessary for palming off or false labeling. Therefore, whether under Federal or State law, Bardy's claim for damages to a trade name must fail.*

2. "La Nouvelle Eve" Had No Secondary Meaning in the Market, Was Not Infringed by "La Nue Eve", and There Was No Proof of Actual Damage to Bardy Proximately Caused by the Use of the Title "La Nue Eve" From July 29 to October 21, 1959.

Even if the law of trade names under either state law or the Lanham Act were favorable to Bardy's theory, there are further reasons why he cannot prevail either on liability or on damages.

(a) *Lack of Substantial Similarity.*

First, there is not, as a matter of law, any substantial similarity between the title "La Nouvelle Eve" and "La Nue Eve". Without that there is no liability (Restatement of Torts §728). The phrases in their French spelling and pronunciation are different. In their translation they mean different things—The "New Eve" and The "Nude Eve." The manner in which they were advertised clearly shows that they were used for altogether different performances by different producers, in different settings, and at different times. As Plaintiff's

*The rule in the Ninth Circuit under *Stauffer v. Exley* (184 F. 2d 962 (9th Cir. 1950)), *Pagliero v. Wallace China Co.* (198 F. 2d 339 (9th Cir. 1952)) and the cases decided under that rule that there is a Federal law of unfair competition under Sections 44 and 45 of the Lanham Act, do not, it is submitted, change the elements of unfair competition or alter its essential substantive requirements. With the Supreme Court's declaration of Federal policy narrowing the scope of unfair competition in *Sears* and *Compco, supra*, to proof of palming off and/or false labeling with actual damages, these requirements for relief exist even under any such Federal law of unfair competition.

Exhibits 109, 141-A, B and C demonstrate, the advertising for "La Nue Eve" contained over each word a translation of the French as follows: "La NUDE Nue THE Eve EVE". The "La Nouvelle Eve" advertising carried the notation that the show was produced by Rene Bardy. "La Nue Eve" was advertised as co-billed with Joe E. Lewis and "featuring Les Girls de Paree'." Thus in juxtaposition, or as advertised, there is no substantially confusing similarity between the two titles. A title which is not confusingly similar is not subject to judicial prohibition merely because it relates to a similar subject matter (*Frohman v. Miller,* 29 N.Y. Supp. 1109 (1894); ("Charley's Aunt" not confusingly similar to "Charlie's Uncle"); *Selig Polyscope Co. v. Mutual Films Corp.,* 169 N.Y. Supp. 369 (1918), affd., 169 N.Y. Supp. 1113 (1918) ("House of a Thousand Candles" not confusingly similar to "House of a Thousand Scandals"); *Palmer v. Gulf Oil Co.,* 79 F. Supp. 731 (S.D. Cal. 1948) ("World Oil" not confusingly similar to "World Petroleum"). Moreover, where distinctions between uses of two titles are manifest from the advertising, there is no confusing similarity (*Curtis v. Twentieth Century-Fox Film Corp.,* 140 Cal. App. 2d 461, 295 P. 2d 62 (1956); *Fidelity Appraisal Co. v. Federal Appraisal Co.,* 217 Cal. 307, 317 (1933); *Beverly Hills Hotel Corp. v. Hilton Hotels Corp.,* 134 Cal. App. 2d 345 (1955)).

With respect to what in the United States was never anything more than a title rather than a trade-name, plaintiff misconceives the nature of titles and the rights surrounding them. What plaintiff adopts is the long rejected notion that one has a "property right" in a title, any "trespass" upon which entitles plaintiff to an award of damages. It is elementary that an allegation that defendant "appropriated a title created by plaintiff does not, standing alone, state a cause of ac-

tion." (*Columbia Pictures Corp. v. National Broadcasting Co.,* 137 F. Supp. 348 (S.D. Cal. 1955) (and numerous cases cited therein); *Harms Inc. v. Tops Music Enterprises, Inc.,* 160 F. Supp. 77, 82 (S.D. Cal. 1958); *Jollis v. Jacques,* 13 Fed. Cas. 910, 914 (1852) (establishing rule still followed that titles are not protected by copyright)). Since titles are not property and are not copyrightable, the only legal theory upon which Bardy can proceed is to prove a *palming off* by Appellants of their product or identified as that of Bardy after Bardy's title has acquired a secondary meaning and to prove that as a proximate result thereof, Bardy has lost specific customers. (*Disney v. Souvaine Selective Pictures,* 98 F. Supp. 774 (S.D.N.Y. 1951), aff'd., 192 F. 2d 856 (2d Cir. 1951)).

(b) *Lack of Secondary Meaning.*

There was clearly not sufficient evidence to support the jury's implied finding of a secondary meaning in the title "La Nouvelle Eve". At best, plaintiff had used the title only in Las Vegas for a period of approximately ten weeks at the time of the alleged misappropriation of the title by defendants. The prior use of the same phrase as the name for a Paris night club by a French Corporation cannot serve to establish secondary meaning for Bardy in the United States. It was indeed conceded by Bardy that prior to opening in Las Vegas in January, 1958, "there was not what you might call a general professional reputation or general reputation among the American public of the title 'La Nouvelle Eve'." [Tr. 997-998]. And again ". . . La Nouvelle Eve had not been generally advertised or known to the general public . . ., even though it may have had a "professional reputation" among experts [Tr. 1014]. As the Supreme Court said in *Hanover Star Mill Co. v. Metcalf,* 240 U.S. 403, 416, 36 S. Ct. 357, 60 L. Ed. 713 (1915): "The mark of itself can-

not travel to markets where there is no article to wear the badge and no trades to offer the article." And in the *Shoppers Fair* case, the court said: "The fact that a trademark or trade name may have acquired a secondary meaning in one locality does not mean it has such meaning in an entirely different trade area. . . ." (*Shoppers Fair of Ark., Inc. v. Sanders Co.,* 207 F. Supp. 718, 728 (W.D. Ark. 1962); see also *Fairway Food v. Fairway Mkt.,* 227 F. 2d 193 (9th Cir. 1955) *Weatherford v. Eytchison,* 90 Cal. App. 2d 379 (1949)). Plaintiff's title was at best a "weak" title, requiring a very strong showing to support secondary meaning. (*Collins v. Metro-Goldwyn-Mayer,* 25 F. Supp. 781, revd. 106 F. 2d 83 (2nd Cir. 1939)) ("Test Pilot"); *Curtis v. Twentieth Century-Fox Films, Inc., supra.; Durante v. Paramount Pictures Corp.,* 111 N.Y.S. 2d 138 (1951) ("That's My Boy"); *McGraw-Hill Book Co. v. Random House,* 225 N.Y.S. 2d 646 (N.Y. Sup. Ct. 1962) ("PT-109"); *Ball v. United Artists Corp.,* 214 N.Y.S. 2d 219 (1961) ("China Doll")).

The only testimony given to support any secondary meaning in plaintiff's title among the public was given by one or two so-called trade witnesses, experts in the field, who admittedly were not in the least confused [Tr. 87, 916]. Secondary meaning requires proof that a substantial segment of the population are aware of an association between the title and a particular producer and there was no such evidence in this case. (*Becker v. Loew's, Inc.,* 133 F. 2d 889 (7th Cir. 1943), cert. den. 319 U.S. 772 (1943); *Manners v. Triangle Films Corp.,* 247 Fed. 301 (2d Cir. 1917); *Blich v. NBC,* 49 F. Supp. 346 (N.D. Ill. 1942); *Collins v. MGM, supra; Curtis v. Twentieth Century-Fox, supra; Whitman v. MGM,* 289 N.Y.S. 961 (1936); *Disney v. Souvaine Selective Pictures,* 98 F. Supp. 774 (S.D. N.Y. 1951), aff'd 192 F. 2d 856 (2d Cir. 1951)).

(c) *Failure of Proof of Damages.*

While Bardy failed to prove the two prerequisites for title or trade name protection, secondary meaning and confusing similarity, he further and fatally failed to prove actual damages. To recover damages for an alleged title or trade name infringement, it was encumbent upon Bardy to prove (1) actual damages to the title or (2) wrongful "profits" to Appellants. "Damages", as used in this connection, require a factual showing by Bardy that but for Appellants' use of a confusingly similar title, the public would have purchased Bardy's product or service, or that as a proximate result of the use of the title "La Nue Eve" the public attended believing that they were attending Bardy's show. In short, Bardy must prove actual lost customers. (*Hesmer Foods, Inc. v. Campbell Soup Co.,* 346 F. 2d 356 (7th Cir. 1965); *Laskowitz v. Marie Design, Inc.,* 119 F. Supp. 541 (S.D. Cal. 1954); *Fidelity Appraisal Co. v. Federal Appraisal Co.,* 217 Cal. 307 (1933)). There was no such evidence presented by Bardy in this case, other than the testimony of Lou Walters, producer of the Folies Bergere at the Tropicana Hotel in Las Vegas [Rep. Tr. 924], that he was "told" by other hotel operators in Las Vegas that because of the "confliction" of "La Nouvelle Eve" with "La Nue Eve", they were not interested in "La Nouvelle Eve" [Pltf. Ex. 384]. That evidence was conceded to be completely hearsay, was repeatedly objected to, and was admitted over objection by the Court "not to prove the truth of what Walters wrote the plaintiff", but "a report by an agent to his principal", which may not be true in the slightest. The District Court said: *"It cannot be received and considered as evidence of the truth, but only the evidence of what was reported to this plaintiff* [Rep. Tr. 981]. (Emphasis added.) The Walters self-serving testimony introduced by Bardy in an at-

tempt to show damages contained its own seeds of destruction. In his testimony, Walters admitted that Bardy's "La Nouvelle Eve" was "in competition" with his shows; that he would not go out of his way to have it brought back to Las Vegas [Rep. Tr. 962, 973, 977], and that he "wasn't too anxious to see other places get an attraction which might interfere with the Tropicana's business" where Mr. Walters was producing the Folies Bergere [Rep. Tr. 977].

Thus (1) the Walters testimony was admitted solely to show his report to Bardy, (2) was not admissible evidence of, or admitted for the purpose of showing lost customers, and even if (1) and (2) were not present, was (3) the self-serving statement of a competitor of Bardy calculated to keep Bardy out of the Las Vegas market. It is particularly noteworthy that Bardy *did not subpena on discovery or at the trial a single hotel operator or show purchaser in Las Vegas, Reno or elsewhere to testify on the issue of damages, despite the fact that they were within easy reach and limited in number. This was not the usual situation where customers widely dispersed, are unknown and plaintiff is handicapped in proving damages.* Nor was there a single witness called to testify that he attended a showing of "La Nue Eve" believing it to be Bardy's production. There was, therefore, absolutely no evidence of damages proximately caused by Appellants' alleged use of the title "La Nue Eve".

Nor did Bardy make any effort to prove that Appellants made a profit from the allegedly infringing use. Absent such a showing, evidence of which was easily available by subpoenaing the Hotel's records for the period in question, Bardy failed on that issue of proof and cannot claim that Appellants made his showing of (a) damages or (b) profits, impossible.

The fatal difficulty with Bardy's pleading and proof of damages is that it is based upon *equitable doc-*

trines fashioned by the courts in injunction proceedings *but not applicable in an action at law for damages.* Where the owner of a trade name that has acquired a secondary meaning brings an action *to enjoin in the future* another's adoption and use of a confusingly similar trade name or title, the courts have traditionally granted injunctive relief upon a showing that there is a *"likelihood of public confusion."* (*Brooks Bros. v. Brooks Clothing of California,* 60 F. Supp. 442 (S.D. Cal. 1945) *aff'd,* 158 F. 2d 798 (9th Cir. 1945), cert. den. 331 U.S. 824, 67 S. Ct. 1315, 91 L. Ed. 1840 (1945) (no proof of actual damages; injunction proper, but damages not recoverable). Where, however, the trade name owner sits on his rights, and permits "likelihood" of confusion to develop into what he claims is actual confusion causing *actual damages,* he must plead and prove *actual damages*, and not merely a *likelihood* of confusion, with a consequential loss of customers or wrongful profit to the infringer. (*Brooks Bros. v. Brooks Clothing of California, supra; Matzger v. Vinikow,* 174 F. 2d 581, 583-584 (9th Cir. 1927); *Sleeper Lounge Co. v. Bell Mfg. Co.,* 253 F. 2d 720, 723 (9th Cir. 1958); *National Van Lines v. Dean,* 237 F. 2d 688, 694 (9th Cir. 1956); *Tillman & Bendel v. California Packing Corp.,* 63 F. 2d 498, cert. den., 54 S. Ct. 55, 290 U.S. 678, 78 L. Ed. 554 (1933); *Ste. Pierre Smirnoff, Fls., Inc. v. Hirsch,* 109 F. Supp. 10 (S.D. Cal. 1952); *Ball v. United Artists,* 214 N.Y. 2d 219 (1961); *Chester Barrie, Ltd. v. Chester Laurie, Ltd.,* 189 F. Supp. 98 (S.D. N.Y. 1960)). On these issues, Bardy's proof fails totally and completely. There was *no evidence* of actual confusion, *no evidence* of lost customers, *no evidence* of profit to Appellants.

Having totally failed to meet the burden of proof on damages or profits as required, Bardy falls back upon a theory of "injury to the reputation" of the "La Nouvelle Eve" title. But again he tilts at windmills be-

cause there was again no evidence to support that claim. To prove injury to reputation, the first user of a trade name or title must establish (1) that the infringer's product is inferior, (2) that purchasers believing the product bearing the infringing name to be that of the first user, purchased it and found it to be inferior, and (3) as a proximate result of their experience, the purchasers thereafter refused to purchase the first user's product. (*Yale Electric Corp. v. Robertson,* 26 F. 2d 972 (2d Cir. 1928). See also, Brown, Advertising and The Public Interest: Legal Protection of Trade Symbols, 57 Yale L.J. 1165 (1948)).

Bardy's evidence relative to the Henchis line of girls under the title "La Nue Eve" was merely that it was a "different" show; no evidence established that it was inferior, or that any patron received less nudity or entertainment than he paid for, or that as a result of viewing "La Nue Eve" any patron thereafter refused to patronize Bardy.

Even if, theoretically and without factual proof, the acts of El Ranco Hotel Operating Co., Katleman and Henchis in presenting the Henchis line of girls as "La Nue Eve" from July to October, 1959 with the Joe E. Lewis show were injurious to the reputation of the "La Nouvelle Eve" title, such injury would be an injury *to the business.* This is particularly true where, as here, Bardy specifically waived and disclaimed at the trial any claim to or right to recover damages for injury to his own *personal* reputation or to his own personal reputation in the night club business. Absent injury or even a *claim* of injury to his *personal or business reputation,* the case becomes one where the gravamen of the offense was a claim that the title "La Nouvelle Eve" was falsely associated with a different production. (See *e.g., Carroll v. Warner Bros. Pictures,* 20 F. Supp. 405 (S.D. N.Y. 1937) (claim of injury to reputation of motion picture title is actionable as disparagement)). An essential ele-

ment in all such cases is proof of *special damages.* (*Eversharp, Inc. v. Pal Blade Co.,* 182 F. 2d 779 (2nd Cir. 1950), (applying same rule under §43 of the Lanham Act); (*Shaw Dry Cleaners & Dyers v. Des Moines Dress Club,* 215 Iowa 1130, 245 N.W. 231 (1932); *Denny v. Northwestern Credit Assn.,* 55 Wash. 331, 104 Pac. 769 (1909); *Tower v. Crosby,* 214 App. Div. 392, 212 N.Y.S. 219 (1925). As Prosser says, "The plaintiff must identify the particular purchasers who have refrained from dealing with him, and specify the transactions of which he claims to have been deprived." (Prosser, Law of Torts (2d ed.) 766). The California courts recently adopted this rule over a plea that proof of general damages was sufficient. (*Erlich v. Etner,* 224 Cal. App. 2d 69, 73-76 (1964)). This rule is, of course, merely a particularization in a specific type of case of the general rule that damages cannot be remote, speculative or uncertain.

The damages rules requiring proof of loss of specific customers in cases of palming off and disparagement, by necessary result dispose of Bardy's argument that he need not produce such evidence because his inability to produce the evidence "was caused" by Appellants. Certainly any loss of specific customers would be as ascertainable by Bardy as anyone else, especially in a market of limited size like Las Vegas and he made no effort to prove "profits" to the Appellants.

C. Bardy Was Not Deprived of His Performers or Other Elements of Production by Any Wrongful Act of Appellants and Proved No Damages.

Bardy's claim that one of the purposes of the alleged conspiracy and one of the items of damage suffered was the depriving him of "his" performers and other production elements during the term of the extension contract and during the run of "La Nue Eve" are clearly not supported in the record.

This alleged deprivation was in two parts: first, during the period of the extension agreement—April 8 to June 2, 1959. The facts show that Bardy *consented* to the use of all of the elements of the "La Nouvelle Eve" production during that period [Rep. Tr. 2539, 292-293, 2543-2544]. The facts show that Bardy testified that he could put together another production of "La Nouvelle Eve" in Paris if the show was held over in Las Vegas and was not dependent upon the performers in Las Vegas [Pltf. Ex. 232, 234]. He was not, therefore, deprived and clearly not damaged. Even if there were a breach of the extension agreement by the Hotel for that period, a breach denied by the Hotel and certainly not participated in or precipitated by MCA or Gerber, the "damages" for "depriving" Bardy of his performers and the other elements of the production surely could not exceed the sum *he agreed,* on March 6, 1959 [Pltf. Ex. 492] was his price for the use of those items during the extension period. That sum was $5,000 per week gross to Bardy [Pltf. Ex. 492]. There is no evidence to support any claim that had the show returned to Paris on April 8 and reopened there and run to June 2, 1959, Bardy would have made a sum equal to or in excess of $5,000 per week. If there was a breach of the extension contract by the Hotel, Bardy's maximum damages for all elements of "La Nouvelle Eve" would be precisely calculable and would total $40,000 for breach of contract.

The second alleged deprivation occurred during the period from July 29 to October 21, 1959, when the Charles Henchis line of girls came to Las Vegas from Paris. Here Bardy's claim is that he had a contract with Henchis to return to Bardy's Paris club after the Las Vegas run [Pltf. Ex. 57, 473]. There is no dispute over the facts here. Henchis returned to Paris, offered himself for work, but Bardy's club was closed and Bardy was incommunicado [Rep. Tr. 2039-2040, 2042,

2048]. Litigation ensued between Bardy and Henchis, the result of which the trial court erroneously excluded [Pltf. Ex. 336; Rep. Tr. 2087-2088]. The fact remains, that whatever the outcome, Henchis was free to return to Las Vegas with his line of girls on July 29, 1959 [Pltf. Ex. 334; Rep. Tr. 2051, 2700], and there is no evidence that Bardy undertook to mitigate his alleged damages by opening his club and replacing Henchis and his line of girls. Bardy's own testimony was that none of the troupe in Las Vegas was necessary for his continued operation either in Paris or elsewhere in the United States. Again it must be emphasized that whatever the relationship was between Bardy and the Hotel after June 2, 1959, MCA and Gerber were not parties to that relationship or to any of the acts done pursuant to it.

D. The District Court Erred in Not Sustaining Appellants Objections to the Admissions of the Contracts and Records of the Stardust Hotel and the Tropicana Hotel for "The Lido" and "Folies Bergere" Productions.

Over Appellants objections [Rep. Tr. 829, 836, 853-859] the District Court permitted the introduction of the contracts and records purporting to show the financial arrangements existing between the Tropicana Hotel for the "Folies Bergere" [Pltf. Exs. 532, 533] and the Stardust Hotel for the "Lido" show [Pltf. Ex. 571].

Although "similar business evidence," properly qualified, is admissible in certain cases on the issue of value, it is only admissible (1) when the value issue cannot be reasonably arrived at by the use of other more reliable evidence and (2) when, assuming the necessity for it under (1), there has been a proper foundation laid to show the precise similarity between plaintiff's property and the properties offered for comparison (*Los Angeles County v. Faus,* 48 Cal. 2d 672, 312 P. 2d 680

(1957); *Clark County School Dist.*, 87 Nev. 11, 348 P. 2d 164 (1960); *Allen v. Chicago & Northwestern R.R.*, 145 Wisc. 263, 129 N.W. 1094 (1911)).

The evidence here met none of the tests for admissibility set forth above. In addition, the court improperly admitted over objection, heresay newspaper reports regarding what was paid for such shows [Pltf. Exs. 94, 170].

1. There Was Sufficient Evidence on Damages Independent of the "Similar Business" Evidence; Such Evidence Was Unnecessary and Highly Prejudicial.

Where, as here, Bardy was engaged in a new business venture in a new area, the best and only measure of damage caused to him by a loss of that business is *his* experience in that new market for the time he has been there (*Knier v. Azores Constr. Co., supra*). All evidence other than Bardy's experience to date in the new market is prejudicial because it enables the jury to speculate on damages in a situation where speculation is not only unnecessary but also too attractive to the empassioned mind.

In this case, plaintiff introduced evidence of the value of his property in the particular market area, Las Vegas, and during the time that he had had experience in that market area. That evidence consisted of the original and the extension contracts between El Ranco Hotel Operating Co. and La Nouvelle Eve Corporation showing that the going price for the show was a gross $15,000.00 per week for ten weeks, and a gross to Bardy of $5,000.00 per week for eight weeks during the extension contract which Bardy refused to perform [Pltf. Exs. 90, 90a, 90b, 91 and 472]. Further, there was in evidence an exercised option agreement whereby the Hotel could return the show the following year *at the same price* [Pltf. Ex. 238]. It is clear that the evidence, without the so-called "similar business"

evidence, establishes that at best Bardy's damages could not exceed $5,000.00 per week for eight weeks and even that figure is in dispute during the extension period when the only available buyer was not willing to pay Bardy a net of more than $2,000.00 [Tr. 2653, *et seq.*]. The established contract price in the market is the best evidence of the value of Bardy's show and the existence of such direct evidence makes unnecessary and prejudicial admission, over Appellants' objections, of the "similar business" evidence.

2. There Was No Sufficient Showing of Similarity Between "La Nouvelle Eve" and the "Lido" and "Folies Bergere" Shows.

Over Appellants' objections, the District Court admitted into evidence the records and contracts of the Tropicana Hotel [Pltf. Exs. 94, 532, 533], the testimony of Lou Walters, producer at the Tropicana [Tr. 916], regarding the financial arrangements for the Folies Bergere show and the record of the Stardust Hotel [Pltf. Ex. 531] and the testimony of A. W. Orsene [Tr. 855, *et seq.*], custodian of the records, regarding the financial arrangements for the Lido show. In addition, the testimony of Marshall Rubin, comptroller of the Stardust [Tr. 825 *et seq.*] was received. All of this evidence was offered to show what other *alleged similar* Las Vegas nightclub shows received and to persuade the jury that such evidence would constitute a fair measure of the damage allegedly suffered by Bardy.

It is well established that such "similar business" evidence is admissible only where the businesses are *in fact,* similar (*Bagdasarian v. Gragnon,* 31 Cal. 2d 744 (1948); *Los Angeles County v. Faus,* 48 Cal. 2d 672 (1957)). The court pointed out in *Faus, supra,* that comparative evidence requires *careful safeguards,* including proof that the parcels of property were alike in *physical characteristics,* that other sales were *proximate*

in time and that evidence of these matters be *clearly established.*

A comparison between La Nouvelle Eve, on the one hand, and the Lido and Folies Vergere show on the other, demonstrates the following:

When Bardy came to Las Vegas in October 1958 and saw the Lido show, Bardy was very disturbed because he felt his show did not measure up to, could not be considered on a par with, or complete with the spectacular Lido show [Rep. Tr. 2356].

Louis-Guerin [Tr. 87 *et seq.*], general manager of the Lido Club in Paris, testified for plaintiff by deposition [Pltf. Ex. 447] that the La Nouvelle Eve Club in Paris (which, incidently, did not play the show in Paris under the title "La Nouvelle Eve"), ranked *fifth* among the production shows, the order of importance and prestige being (1) Folies Bergere, (2) Moulin Rouge, (3) Lido, (4) Casino de Paris and (5) La Nouvelle Eve [Tr. 97]. He further testified regarding these other shows that "they were all different." [Tr. 98-99].

While in artistic quality he thought the shows at the La Nouvelle Eve Club were "one of the best" [Rep. Tr. 99], such an opinion does not establish the required "similarity."

Plaintiff's witness, Lou Walters, producer of the Folies Bergere at the Tropicana, speaking of the shows at the La Nouvelle Eve Club in Paris, testified "it was no Folies Bergere—it was no Folies Bergere or Lido, but it was a good show." [Rep. Tr. 998].

In Las Vegas, the Lido, Folies Bergere and La Nouvelle Eve shows were entirely different. Again, the Lido and the Folies Bergere were regarded as the two most spectacular shows and the shows most people came to Las Vegas to see [Rep. Tr. 873]. As Marshall Rubin testified, the Lido was and is the most successful show in Las Vegas [Rep. Tr. 850]. Thus both in Paris and in Las Vegas there was admittedly a great disparity in

popularity and success, and consequently in value, between the show at La Nouvelle Eve Club, on the one hand, and the Lido and Folies Bergere on the other.

Approaching similarity from another angle, even greater disparity appears. Some of the factors testified to which affect this issue are: the setting in which the show is staged; the costumes; the choreography; the production techniques and the box-office capacity of the room in which shows are played. On these points, the evidence can be summarized as follows:

The Folies Bergere played the Tropicana Hotel; La Nouvelle Eve played the El Rancho Vegas Hotel; the Lido played the Stardust Hotel. A. W. Orsene of the Tropicana testified [Rep. Tr. 855, *et seq.*] that the consensus of opinion is that the Tropicana Hotel is the most beautiful in Las Vegas [Tr. 871], thus giving it a popular appeal over other hotels and making its budgets higher and the success of its shows more likely. Insofar as lighting, costumes and scenery are concerned, the court itself obtained from Bardy's counsel the concession that the Tropicana had "about the best money can buy." [Rep. Tr. 874]. The special engineering and lighting system alone there cost $30,000 [Rep. Tr. 873]. The Tropicana showroom was built as a theater restaurant and is a theater in itself [Rep. Tr. 876]. The show room in the El Rancho Vegas Hotel "didn't have close vision . . . you had pillars and a very low seating" and the stage "was really a floor show", as distinguished from the Tropicana's lavish "theater" [Rep. Tr. 876]. The Tropicana seats 550 people for the dinner show and 650 for the late show [Tr. 878] with three shows on Saturday night. As the court pointed out, the seating capacity is important, since everyone is "in the business for money" [Rep. Tr. 879]. The costumes alone cost $300,000 to $350,000 per year [Rep. Tr. 870]. Bardy's costumes for "The Nouvelle Eve" cost $4,000 [Pltf. Ex. 157].

Marshall Rubin of the Stardust testified for plaintiff [Tr. 725, *et seq.*] regarding the spectacular engineering features used in the production of the Lido show, including an ice rink, swimming pool, girls descending out of the ceiling, mirrors and other matters, the production cost of which runs as high as $400,000 per year [Rep. Tr. 853-854]. Moreover, the Stardust is the largest hotel in Las Vegas in number of rooms [Rep. Tr. 851]. The Stardust Theater seats 1500 to 1600 people each night and on Saturday night 2300 to 2500 people [Rep. Tr. 850]. The Lido show is recognized in Las Vegas as the most successful show on the strip [Rep. Tr. 850-851].

With respect to the actual physical content of the La Nouvelle Eve show and the Lido show, a comparison of what was called for in the El Ranco-La Nouvelle Eve contract [Pltf. Ex. 90] and the Stardust-Lido contract set forth in the record [Rep. 847, *et seq.*] clearly proves the dissimilarity of the physical content of those two shows. The same result obtains by comparing Plaintiff's Exhibit 90 for the La Nouvelle Eve show with Plaintiff's Exhibit 531 for the Folies Bergere show. The La Nouvelle Eve show as it played Las Vegas was substantially the same show that played in La Nouvelle Eve Club in Paris under the name "Shocking." Having seen that show in Paris and being fully familiar with the Folies Bergere and Lido shows, Lou Walters testified for Bardy as follows:

> "Q. Now, you referred in that testimony to the difference between Lido, Folies Bergere and La Nouvelle Eve shows. Would you explain what you meant by the difference between the type of revenues presented by those respective night clubs or theaters? A. Well, the Folies Bergere is a theater. In the Folies Bergere there is something like 75 to maybe 100 people. They use a great deal of scenery, and a great deal of the effect on the

audience from the show presented at the Folies Bergere comes from the scenery effects. The director of the Folies Bergere is somewhat of a genius when it comes to scenery. * * * Where the Nouvelle Eve had a line of perhaps 12 or 16 dancing girls, and perhaps a dozen show girls, the Folies Bergere would have dozens. Have two or three different groups of dancers used in their production numbers. A great many more production people. * * * They would also have 12 — what they call over there mannequins, which are the nude girls. And they would in addition have a dozen show girls who were not nudes but neither were they dancers, they were show girls. The Folies Bergere seats perhaps 1500 people. The La Nouvelle Eve seats probably from two to three hundred people—two hundred fifty to three hundred people. The La Nouvelle Eve show would run an hour and a quarter for the first part and maybe an hour for the second part. The Folies would open at eight thirty and run continuously, except for a fifteen-minute intermission, until 12 o'clock. Three hours or more. The Lido gets a great deal of its impact from the use of what we call props, or you might call devices. A skating rink that comes out, or a waterfall-other props. La Nouvelle Eve, because of the small size of the stage, would use practically no props—at least I can't remember any. Their scenery would be confined to two, three, four or five back curtains in the extreme rear of the stage without its being placed on any part of the actual dancing stage."

He further testified that in French money the Lido show would cost roughly twice as much as La Nouvelle Eve [Rep. Tr. 1005]. In revenues, the Lido derives much more, or as Mr. Walter put it, "Oh, tremendous difference. The Lido has got three times as many

people. Has a far bigger business." [Rep. Tr. 1007]. The La Nouvelle Eve's revenue would be "perhaps a third." [Rep. Tr. 1007].

From every conceivable angle, there is no showing of any similarity between La Nouvelle Eve and the Folies Bergere and The Lido shows. Bardy's myopic comparison simply overlooks the facts of dissimilarity and comes down to a reliance upon the fallacy that because apples and oranges are both round and are classified as fruit, they are the same. Because La Nouvelle Eve, on the one hand, and the Folies Bergere and The Lido shows on the other all originated in Paris, and all staged production numbers Bardy attempted to persuade the jury that a French show is a French show without distinctions. If one is worth a million dollars, they all are. That this is erroneous has already been demonstrated above and the failure of the District Court to reject this evidence and testimony was clearly prejudicial error.*

The alleged "similar business" evidence erroneously permitted the jury to have before it evidence of the tremendous amount of money paid by the Tropicana and Stardust for wholly incomparable, superior, more successful shows played in wholly dissimilar and much larger Hotels, in determining the damage, if any, suffered by Bardy from the alleged acts of the Appellants regarding La Nouvelle Eve.

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*Other of Bardy's own witnesses testified to the utter dissimilarity of the three shows. Lou Walters, for example, producer of the Folies Bergere at the Tropicana, testified:

> "Q. What are the standards by which you evaluate the pattern or quality of that particular type of show? A. I can't define it. The 'Nouvelle Eve' was a good show. I made no effort to compare it with what anybody else does. And 'Nouvelle Eve' has its own appearance. It is a particular kind of show, the same as the Lido is a particular kind of show. You can tell a Lido show. You can tell a Folies Beregere show. * * *" [Rep. Tr. 929-930].

E. The Punitive Damages Award Were Unsupported by the Evidence and Excessive in Amount Against Both MCA and Gerber.

Both with respect to MCA and to Gerber, there was absolutely no evidence that either acted in their relationships with Bardy with the necessary *malice* to support an award for punitive damages. The previous review of the evidence demonstrates beyond question that defendants acted at all times in the good faith belief that they were representing their client to the best of their ability and for his best interest. Further, the review of the evidence made herein establishes that Bardy suffered no actual damages and the court properly instructed the jury that there could be no recovery of punitive damages absent proof of actual damages [Tr. 3102]. Alternatively, if the evidence establishes proof of any compensable damage to Bardy, the amount of such actual damage cannot, as far as MCA and Gerber are concerned, exceed approximately $46,000.00, all on a breach of contract theory wherein punitive damages are not allowed. The award of $225,000.00 in punitive damages by the jury is not supported by any showing of tortious conduct or malice, and even if those were proved, the amount awarded would be manifestly excessive. The purpose of punitive damages is not to destroy. (*Miller v. Schnitzer,* 371 P. 2d 824 (Nev. 1960); *Rocky Mountain Produce Trucking Co. v. Johnson,* 369 P. 2d 198 (Nev. 1962); *Mother Cobbs Chicken Turnovers v. Fox,* 10 Cal. 2d 203 (1937)).

1. The Award of Any Punitive Damages Against MCA Artists, Ltd. Is Contrary to Law.

In its instructions to the jury, the District Court told the jury that an award of punitive damages may be made only for "wanton, malicious or oppressive" conduct by a defendant [Tr. 3105]. Further, the court

told the jury that a corporation like MCA Artists, Ltd. could be held for punitive damages for the malicious acts of its agent or employee only "if the corporation previously authorized or subsequently ratified the conduct." [Tr. 3105]. With reference to this record, the court instructed the jury that *there was no evidence of any prior authorization* to MCA's agents to do an unlawful act, "so the question is, under the circumstances, was there subsequent ratification of it by the corporation, *with knowledge* of what the agent had done?" [Tr. 3194].

The only theory of ratification put forth by Bardy and relied upon by the court in its instructions [Tr. 3105] was that failure to discharge an employee known to have committed a wrongful act permitted the jury to draw an inference of ratification. A verdict based on such an instruction is both contrary to law and, in this instance, not supported by the evidence.

The applicable Nevada law on the issue of ratification by retention in employment is clearly set out in *J. C. Penney Co. v. Gravelle,* 62 Nev. 434, 155 P. 2d 447 (1945). There a clerk ran out of the store after a thief. The thief dropped the merchandise in the street and while the employee was in pursuit, plaintiff started interfering with the employee. The employee picked up the merchandise and started walking back to the store, all the while arguing with plaintiff. Finally they got into a fight and plaintiff was badly hurt. In an action against the store for assault and battery, the court held that the tort was not authorized and that failure to discharge the employee with knowledge of the tort *was not sufficient evidence of ratification.* Moreover, even the fact that in addition to failing to discharge the employee, he was given an increase in salary did not make out ratification. Recent rulings by the Nevada courts are in accord with the general law of agency

as expressed in the Restatement of Agency, 2d, §94, comments d and 217c. According to the Restatement, regardless of whether the tort was committed in the scope of employment, there can be no ratification merely upon a showing that the employer, even with knowledge of the tort, failed to discharge the employee. Recent California cases are in accord. In *Sullivan v. Matt,* 130 Cal. App. 2d 134 (1955), the defendant retained and promoted an employee after he had assaulted another in the scope of his employment. The court held that the defendant did not thereby ratify the tort.

The older Nevada cases of *Forrester v. So. Pacific Co.,* 36 Nev. 247 (1913), and *Burrus v. N.-C.-O.-Ry.,* 38 Nev. 156 (1914), appearing to permit a finding of ratification by retention in employment, are either impliedly overruled by the *J. C. Penney* case, *supra,* or to be distinguished as cases involving public utilities and strict liability.

F. There Was No Breach by MCA or Gerber of the Artist's Agency Contract nor Any Proof of Damages Proximately Caused by Any Such Alleged Breach.

Under the express terms of the agency contract [Pltf. Ex. 73] MCA became Bardy's agent and agreed to "occupy itself diligently without, however, guaranteeing the success of its endeavors." [Pltf. Ex. 73]. Bardy, under the contract, reserved to himself the right to refuse to accept "business proposals" submitted to him by MCA. (*Ibid.*) That contract began on August 1, 1958 and continued until terminated by Bardy on or before May 6, 1959 when he brought suit against MCA in Paris to annul the agreement. Although constantly attempting to go behind and to undermine the fact, *Bardy stipulated at the trial that MCA and Gerber fully performed all of their duties under that contract*

until on or about April 1, 1959. Bardy's theory appears to be that on or about that date, Appellant Gerber breached the agency agreement by allegedly failing to communicate with Bardy in Paris from April 1 to April 8, 1959, by accepting on behalf of Bardy, as he was instructed to do, a modified version of the extension contract, by failing to return the troupe to Paris on April 10, 1959, despite the fact that Gerber had no such instruction from Bardy and by knowledge that the Henchis line of girls played at the El Rancho Vegas Hotel from July 29 to October 21, 1959 (over which he had no control).

Does the law or the evidence support a finding that MCA or Gerber failed to perform the duties required of them under the agency contract?

By contract they were required to occupy themselves "diligently" with Bardy's affairs; they did not guarantee their success and Bardy had the right to refuse any offer transmitted to him by MCA or Gerber [Pltf. Ex. 73]. "Diligently" in this context means simply that an agent will use reasonable care, defined as that standard of care and skill which is the standard "in the locality for the kind of work which the [agent] is employed to perform." (Restatement, Agency 2d §379; *Baltimore Baseball Club & E. Co. v. Pickett,* 78 Md. 375, 28 Atl. 279; *Scott v. Security Title Ins. Co.,* 9 Cal. 2d 606, 72 P. 2d 143 (1937)) Further, an agent is under a duty "to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him" (Restatement, Agency 2d §381), *unless* the principal is already aware of the facts. (*Ibid.,* Illustration 1) Also of importance here is the general rule that an agent is subject to a duty to the principal to follow the *expressed* instructions of the principal. (Restatement, Agency 2d §383). This latter duty is qualified to the extent that where the instructions

from the principal are ambiguous or absent, the agent is not liable for conduct in accordance with a reasonable but erroneous interpretation of those instructions (*Moore v. Coler,* 99 N.Y.S. 46, aff'd., 195 N.Y. 507, 88 N.E. 1126 (1909)), or for conduct which the principal has advised against where there has been a substantial change in conditions requiring quick action. (Restatement, Agency §383, Comment a); (See also, *Isenberg v. Sherman,* 212 Cal. 454, 298 Pac. 1004, 299 Pac. 528 (1931)). By the same token, *a principal is under a duty to communicate to the agent* information which is relevant to the affairs the agent is charged with performing. (*Walter v. Libby,* 72 Cal. App. 2d 138, 164 P. 2d 21 (1946)). If an agent reasonably and in good faith misapprehends or acts contrary to the principal's instructions, the principal, when apprised of that fact, "has a duty" to act himself to correct any error. As the court said in *Towles v. Norbest Turkey Growers Assn.,* 275 F. 2d 196, 201-202 (9th Cir. 1960) regarding the principal's duty when he knows an agent has erred,

> "He may not sit idly by and later make known his secret thoughts in an effort to cast an ensuing loss on an agent who has acted in the light of what he had been allowed to reasonably believe he may do."

(See also, 1 Mecham on Agency 333 (2d ed.1914); *Lawrence Warehouse Co. v. Twokig,* 224 F. 2d 493 (8th Cir. 1955)).

Where a principal relying not on the acts or advice of one agent, but on the advice of others, acts in such a manner that he suffers an injury, the agent upon whom he did not rely is not liable for the damage (*Barnes v. Dobbins,* 159 Cal. App. 2d 737, 324 P. 2d 696 (1958); *Matheny v. Farley,* 66 S.E. (W.Va.

1910)), and even where an agent disobeys instructions, he is not liable if in fact the same result would have obtained if he had obeyed the principal's instructions. (*Goddard v. Metropolitan Trust Co. of California,* 82 F. 2d 902 (9th Cir. 1926); *Shrewsbury v. Dupont National Bank,* 10 F. 2d 632 (D.C. 1926)).

These rules of general applicability of the law of agency completely absolve MCA and Gerber of any charge that they breached their agency contract with Bardy. Further, if there was a breach, they are absolved of any charge that such breach proximately caused injury to Bardy. The facts as reviewed heretofore establish beyond question that Gerber performed his duty to communicate Katleman's position of April 1, 1959 to Bardy (a position already known to Bardy); that Gerber used diligence at all times on Bardy's behalf with Katleman, AGVA and the uncooperative cast members; that Gerber sought and received the rulings of AGVA, which by contract and custom had the responsibility for determining such disputes; that Bardy appointed and relied upon the information and advice from agents other than Gerber, viz., Holmes, Durieux and the attorney, Brody, in his actions; that Bardy failed to communicate instructions to Gerber after March 30, 1959 and that Gerber reasonably believed that the actions taken by him were in accordance with Bardy's wishes as Gerber, in good faith, understood them at the time from Bardy's representatives and in a situation of emergency and changed conditions. That Gerber may have been erroneous, may have used poor judgment, may have disappointed Bardy, may have taken a course that would not have been taken by Stein, or may have believed Katleman was justified in his actions—none of those would constitute a breach of the agency contract or make Gerber or MCA liable for such a breach.

There are other reasons why plaintiff is not entitled to the damages awarded. The court properly instructed the jury that Bardy had a duty to mitigate any damages suffered by him. This is in accord with both contract and agency law. (Restatement, Agency 2d §415; *Conners v. Old Forge Discount & Deposit Bank,* 245 Pa. 97, 91 Atl. 210 (1914)). A principal may also be barred from recovery of damages where his own contributory negligence brings about those damages. (*Ibid.*); (see also, *Schustrin v. Globe Indemnity Co.,* 44 N.J. 462, 130 A. 2d 897, 899 (1957); *Fort Valley Coca-Cola Bottling Co. v. Lumberman's Mut. Cas. Co.,* 69 Ga. 120, 24 S.E. 2d 846, 851 (1943)). The facts in this case establish beyond question that any damages suffered by Bardy were the result of his own failure to act in the face of full knowledge of all of the material facts in connection with Katleman's handling of the dispute over the extension agreement. Bardy equivocated; he first accepted, then claimed not to have accepted; he failed to return the troupe to Paris; he failed to advise MCA or Gerber of his decisions; and he placed the entire matter in the hands of representatives and lawyers having no connection with MCA or Gerber. When he had full knowledge of the events of April 8, 1959, he took no action to mitigate his damages nor did he do so when he learned of the Katleman-Gregory-Henchis contract to bring the Henchis line of girls to Las Vegas in July of 1959. His damages, if any, were, therefore of his own making and were not proximately caused by any act of the defendants MCA or Gerber. (See *Goddard v. Metropolitan Trust Co. of California,* 82 F. 2d 902 (9th Cir. 1936)). Again it must be emphasized that a breach of the agency contract, even if proved, would not permit an award of punitive damages.

IX.
APPELLANTS DID NOT RECEIVE A FAIR TRIAL.

A. It Was Prejudicial Error for the Court on Its Own Motion to Transfer the Place of Trial From Las Vegas, Nevada, Where the Facts Occurred, Where the Case Was Filed, and Where a Majority of the Defendants and Witnesses Resided, to Carson City, Nevada.

Appellants submit that the transfer of this case by the court on its own motion from Las Vegas, Nevada to Carson City, Nevada, was prejudicial error.* Such transfer does violence to the spirit of 28 U.S.C. §1404, Rule 3, of the United States District Court for Nevada Rules and to the right of the defendants to a fair trial under the Seventh and Fourteenth Amendments to the United States Constitution. While under normal circumstances it may well be within the discretion of the court to fix the time and place of trial, the action of the court in the circumstances of this case clearly constitutes an abuse of discretion.

Under Rule 3, transfer of the case from the place where the action is filed may only be had "for good cause." No such showing was made in this case. Moreover, the "good cause" requirement normally pertains to the convenience of witnesses and parties (see 28 U.S.C. 1404(a)), and there is nothing in Rule 3 of the Local Rules to indicate any different meaning. Here, all the convenience factors, all the interest of justice factors, and ordinary common sense dictate that the place of

*It should be pointed out that this case was originally assigned to Judge John R. Ross. By purporting to employ a relative of Judge Ross, counsel for Appellee Bardy procured Judge Ross' disqualification from the case, thus setting in motion the chain of events leading to the transfer of the case to Carson City [Clk. Tr. 31, 55].

trial should have been, and as a matter of law, had to be, Las Vegas. Not a single witness in the case was from Carson City; no records were there; all of the previous and voluminous proceedings in the case were in Las Vegas. A heavy burden was put upon all of the appellants to move the trial, the witnesses and the records the approximately 400 miles to Carson City.

Since 28 U.S.C. §108 provides that the United States District Court shall sit in Carson City, Elko, Reno and Las Vegas, there is an implied adoption of "divisions" of said court and under 28 U.S.C. 1404(b) a transfer from one division to another may only be made upon motion of the parties. (Cf. *McNeil Construction Co. v. Livingston State Bank,* 155 F. Supp. 658 (D. Mont. 1957) (rev'd on other grounds); *Walsh and Wells v. City of Memphis,* 32 F. Supp. 448 (W.D. Tenn. 1940). No such motion was made by any party.

B. Appellants Were Denied Their Right to a Fair and Impartial Trial by Jury.

Under the Seventh and Fourteenth Amendments, the appellants were denied their right to a fair trial by an impartial jury. Certainly it is implicit in the concept of jury trial that the jury be drawn from the group of eligible citizens best able to evaluate the conduct of the defendants in their particular environment. (See, *e.g., Utsey v. Charleston,* 38 S.C. 399, 17 S.E. 141 (1893)). One factor to be taken into account in determining the fairness and impartiality of a jury is the proximity in area, environment and experience which the jurors have to the parties to the litigation. (*United States v. Standard Oil Co.,* 170 Fed. 988 (D. Ill. 1909); *Rios v. Lacey Trucking Co.,* 123 Cal. App. 2d 865 (1954).)

It is a widely known fact that the northern and southern sections of the State of Nevada in which Carson City and Las Vegas are located differ markedly in popu-

lation, custom and economic structure. It is also well known in Nevada that there is a substantial segment of the population in the northern section which holds a strong bias against Las Vegas and particularly against the so-called "Las Vegas Strip" hotels. This bias against Appellants identified with Las Vegas is too obvious to be denied.

The jury deliberated in this case for a total time of three hours and forty-five minutes after a trial lasting from August 5, 1963 through August 23, 1963, a total of eighteen elapsed days during which literally reams of complicated documents and contracts were submitted, requiring careful analysis, the testimony of twenty-three witnesses was heard covering over 3,000 pages of transcript, and a set of instructions covering 96 pages of transcript was read. From all that mass, the jury was called upon to determine which, if any, of some 34 individuals named as participants in a conspiracy against Bardy [Tr. 1592-94] did, in fact, do so; which if any, of the seven appellants actually sued on the conspiracy were members of one, and which, if any, of five independent wrongful acts, including breaches of complex contracts, infringement of trade name, injury to reputations and depriving plaintiff of his employees, were committed pursuant to the conspiracy and by whom. Yet in a span of three hours and forty-five minutes the jury in this case resolved all those issues and awarded the unconscionable sum of $476,200.00 to plaintiff on the conspiracy count and $27,000.00 on another and separate contract count. Such haste clearly violated defendants' right to a fair trial by an impartial jury. (*Turner v. Cotham,* 105 N.W. 2d 237 Mich. 1960); *Kenan v. Moore,* 195 So. 167 (Fla. 1940)).

Under 28 U.S.C. § 1865(a) jurors to be selected "so as to be most favorable to an impartial trial. . . ." The Supreme Court pointed out in *Thiel v. Southern Pac.*

Co., 328 U.S. 217 (1946) that the "American tradition contemplates an impartial, cross-sectional jury" and a jury which excludes, without any showing of any balancing need for it, all those persons most apt to represent a cross-sectional jury, results in a denial of a fair trial. The transfer of this case to Carson City from Las Vegas had precisely that affect and the transfer was unlawful.

When to all of this is added the District Court's requiring of Saturday sessions and night sessions, its pressures on counsel cut short presentation of evidence, and to present closing argument without a fair opportunity to settle on and know the Court's proposed instructions to the jury, the denial of a fair trial is manifest.

Conclusion.

On each and all of the foregoing grounds and upon each further ground presented in the Brief of Co-Appellants, the verdict and judgment below should be reversed.

Respectfully submitted,

ROSENFELD, MEYER & SUSMAN,
By ALLEN E. SUSMAN,
VICTOR S. NETTERVILLE,
FOLEY BROS.,
By JOSEPH E. FOLEY,
Attorneys for Appellants, MCA Artists, Ltd. and Roy Gerber.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.*

ALLEN E. SUSMAN.

*The number of pages in excess of those permitted by the rules is pursuant to an Application and Order of the Court approving the increase.

APPENDIX A.

Plaintiff's Exhibits

No.	Identified At Page No.*	Offered At Page No.	Received At Page No.	Rejected**
13				
14		71	74	
16		1014	1014	
18		1014	1015	
20		1015	1015	
21		74	75	
22		1015	1015	
26		1372	1372	
28		1015	1016	
29		1016	1016	
30		1653	1653	
32		1016	1016	
44		1104	1104	
45		1017	1017	
47		75	75	
52		75	75	
56		178	179	
62		1017	1017	
57		1032	1032	
66		1017	1018	
68		1652	1652	
70		75	76	
72		76	76	
73		100	102	
75		106	107	

*Many of the exhibits were not identified, and were marked prior to trial and court sessions.

**Only admitted exhibits are part of the record.

No.	Identified At Page No.	Offered At Page No.	Received At Page No.	Rejected
75 A 1 through 75 A 18		181	181	
76		108	109	
82		109	109	
83		109	110	
86		110	110	
86 A		110	112	
87		112	113	
88		1644	1645	
89		113	113	
90		125	125	
90 A		1260	1261	
90 B		1262	1262	
91		1031	1031	
93		1165	1165	
94		76	77	
95		126	126	
96		879	879	
97		138	139	
98		126	126	
105		703	706	
100		1969	1971	
101		1969	1971	
102		1969	1971	
109		177	178	
129		989	919	
141 A		494	495	
141 B		494	495	
141 C		494	495	
150		184	184	

No.	Identified At Page No.	Offered At Page No.	Received At Page No.	Rejected
151		187	187	
152		2701	2702	
153		187	188	
156		1167	1168	
157			1845	
159		188	188	
162		188	189	
164		189	189	
165		189	189	
166		190	190	
167		190	190	
170		196	198	
179		1858	1858	
183		1293	1294	
185		1281	1283	
186		1368	1370	
191		1368	1370	
193		1368	1370	
196		1368	1370	
198		1373	1373	
200		1314	1315	
201		1314	1315	
205		1368	1370	
207		1368	1370	
209			1206	
211			1206	
212			1206	
213			1206	
214			1206	
215		507	507	

No.	Identified At Page No.	Offered At Page No.	Received At Page No.	Rejected
216			1206	
217			1206	
219		1196	1197	
220			1206	
222		375	375	
225		382	383	
226		383	383	
229			1206	
231			1206	
232			1206	
234			1206	
235			1206	
238		385	385	
239		383	384	
240		384	384	
242			1206	
243		440	440	
244			1206	
247		1222	1222	
250		394	395	
251		394	395	
252		394	395	
253		394	395	
254		394	396	
255		394	396	
256		394	396	
260			1206	
261		394	396	
262		394	396	
264		438	438	

No.	Identified At Page No.	Offered At Page No.	Received At Page No.	Rejected
265			1206	
269			1206	
270		441	441	
271		441	441	
272			1206	
273			1206	
275		910	911	
282		457	458	
284			1206	
292		1368	1370	
294		739	740	
295		1368	1370	
298		1231	1232	
304		1370	1370	
305		1231	1232	
306			1548	
309		1371	1371	
324		532	533	
326		1370	1370	
327		1370	1370	
333		532	533	
334		548	549	
335		555	555	
335 A		545	546	
336		1372	1372	
342		532	533	
343		1327	1328	
347 A		544	545	
364		2699	2700	
368 A		546	547	
378		1373	1373	

No.	Identified At Page No.	Offered At Page No.	Received At Page No.	Rejected
384		971	981	
406		767	767	
415		1646	1647	
419		1646	1648	
421		1646	1647	
426		1646	1647	
438		1646	1647	
439		1646	1647	
447	83			
448		128	128	
449		128	129	
450		129	129	
451		130	130	
452		130	130	
453		130	131	
454		131	131	
455		131	132	
456		132	132	
457		133	133	
458		133	134	
459		134	134	
460		134	135	
461		135	135	
462		135	136	
463		136	136	
464		136	136	
465		136	137	
466		138	138	
467	211			

No.	Identified At Page No.	Offered At Page No.	Received At Page No.	Rejected
468		234	235	
469		235	236	
470		236	236	
471		236	237	
472		238	238	
472 A		1263	1264	
473		238	238	
474		357	358	
475		358	358	
476		365	366	
477		375	376	
478		389	389	
479	392			
480	379			
481 A	412			
481 B	412			
481 C	409			
482		438	438	
483		443	444	
484		444	445	
485	460			
486	464			
487		488	489	
488		508	510	
489		605	606	
490		609	610	
491		611	611	
492		611	612	
493		612	612	
494		612	613	

No.	Identified At Page No.	Offered At Page No.	Received At Page No.	Rejected
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496		613	613	
497		613	614	
498		614	614	
499		614	615	
500		615	615	
501		614	615	
502	620			
503	634			
504		670	671	
505		675	676	
506		685	686	
507		686	686	
508		686	686	
509		687	687	
510		687	687	
511		720	720	
512		511	512	
513	728			
514	728	738	738	
515	729	738	738	
516	730	738	738	
517	730	738	738	
518	730	738	738	
519	731	738	738	
520	731	738	738	
521	732	738	738	
522	732	738	738	
523	732	738	738	
524	732	738	738	
525	732	738	738	

No.	Identified At Page No.	At Page No. Offered	Received At Page No.	Rejected
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527	733	738	738	
528	733	738	738	
529	735	738	738	
530	735	738	738	
531	828	829	830	
532	857	859	859	
533	857	859	859	
534	887			
535	916			
536	1020			
537	1020			
538	1021			
539	1021			
540	1033			
541	1035			
542	1049			
543	1131			
544	1177	1178	1182	
545	1178	1178	1182	
546	1432			
547		1654	1655	
548		1814	1815	
549	1850			
550	2163			
551	2338			
552	2416			
553 A	2583			
553 B	2583			
553 C	2583			

No.	Identified At Page No.	Offered At Page No.	Received At Page No.	Rejected
554	2609			
555		2615	2616	
556		2642	2642	
557		2675	2675	
558	2682			
559		2708	2708	
560		2708	2708	
561		2718	2719	
	Defendant Hotel's Exhibits			
A		1447	1448	
B		1458	1458	
C		1470	1470	
D		1500	1500	
H		1536	1537	
I		1584	1585	
J		1990	1995	
K		2342	2342	
M		1875	1876	
M-1		1878	1878	
N		1901	1902	
P		2567	2567	
Q		2572	2572	
	Defendant MCA's Exhibits			
DR		2399	2399	
DW		2402	2402	
EJ		327	328	
EL		2404	2404	
LC		1596	1596	

No.	Identified At Page No.	Offered At Page No.	Received At Page No.	Rejected
LW		703	706	
MP		2401	2401	
MQ		2401	2401	
MR		2402	2402	
MS		2404	2404	
MT		2403	2403	
MU		2403	2403	
MV		2403	2403	
MW		2404	2404	
MX		2411	2411	
MY		2411	2412	
MZ		2414	2415	
NA		2415	2415	
NB		2400	2400	
NC		2547	2548	
NC-1		2400	2401	
ND		2512	2512	
NE		2525	2525	
		Defendant Gregory's Exhibits		
A		1640	1641	
		Defendant Haetel's Exhibits		
A		2133	2134	
C		2124	2124	
D		2135	2136	

APPENDIX B.

Specification of Errors Relied Upon.

1. The conspiracy verdict and judgment are not supported by the evidence and are contrary to law.

2. The conspiracy verdict against the corporate defendants MCA ARTISTS, LTD. is not supported by the evidence and is contrary to law.

3. The damages awarded are excessive, against the weight of the evidence and contrary to law.

4. The Court erred in the admission, over objection, of so-called "similar business" evidence on damages.

5. The punitive damages award was not supported by the evidence, was contrary to law and was excessive.

6. The Court erred in its instruction to the jury on the burden of proof in conspiracy.

7. The Court erred in submitting the issues to the jury in improper order.

8. The Court erred in refusing to hold that plaintiff's action was barred by the Nevada Fictitious Name statute (Ch. 602, Nevada Revised Statutes).

9. The Court erred in refusing to submit to the jury the issue of whether plaintff's action was barred by the Nevada Fictitious Name statute (Ch. 602, Nevada Revised Statutes).

10. The Court erred in refusing to hold that plaintiff's action was required to be submitted to arbitration, in whole or in part.

11. The Court erred in refusing to hold that plaintiff was not the real or proper party in interest.

12. The Court erred in refusing to hold that plaintiff was estopped to bring this action.

13. The Court erred in refusing to submit to the jury the issue of whether plaintiff was estopped to deny the corporate existence of La Nouvelle Eve Corporation.

14. The defendants did not receive a fair trial and were deprived of their constitutional and statutory rights to a fair trial.

15. The Court erred in denying defendants' motion to transfer the trial to Las Vegas, Nevada.

16. The Court erred in refusing to instruct on the "two-conspiracies" rule and the verdict and judgment are inconsistent with the rule.

17. The Court erred in refusing to instruct on the "two-issues" rule and the verdict and judgment are inconsistent with the rule.

18. The evidence did not support a finding of any knowledge of, participation in, or ratification of any conspiracy by MCA ARTISTS, LTD.

19. The evidence did not support a finding of any knowledge of, participation in, or ratification of any conspiracy by ROY GERBER.

20. The evidence did not support a finding of any knowledge of, participation in, or ratification of any conspiracy by BELDON R. KATLEMAN.

21. It was errror to find that any wrongful acts by any employee or agent of MCA ARTISTS, LTD. was within the scope of the employment of any such employee or agent.

22. The evidence does not support a finding of any legal injury to any personal or property right of plaintiff.

23. There was no breach by MCA ARTISTS, LTD. or by ROY GERBER of the Artists' Agency Con-

tract nor any proof of damages proximately caused by any such alleged breach.

24. It was error to permit the jury to consider alleged lost profits in determining damages.

25. The Court erred in instructing the jury on the issue of trade name infringement under the Lanham Act and as to damages thereunder.

26. Since plaintiff proved neither patent nor copyright infringement, the Court erred in permitting unfair competition theories to be presented to the jury to establish damages pursuant to the alleged conspiracy.

27. The District Judge erred in favorably commenting upon plaintiff's case in the presence of the jury.

28. The verdict was the result of confusion, passion and prejudice.

29. Plaintiff's counsel was guilty of prejudicial misconduct throughout the trial.

30. The award of damages was based on remote and speculative evidence.

31. The Court erred in admitting, over objection, certain assignments to plaintiff.

32. The conspiracy verdict and judgment are internally inconsistent.

33. There exists no basis for the award of damages under the contract of December 1, 1958.

34. The Court erred in denying defendants' motions for a directed verdict.

35. The Court erred in denying defendants' motions for judgment nothwithstanding the verdict or, alternatively, for a new trial.

APPENDIX C.

Direct Testimony of Roy Gerber Regarding April 8, 1959.

"By Mr. Foley; Q. Tell us, now, Mr. Gerber, What occurred on April 8th. A. It wasn't too much longer after that that a great deal of noise came through the backstage area, which is right adjacent to the restaurant. When I got back there there was a security guard from the El Rancho, a town marshal, a man who was later introduced to me as a lawyer, the cast, Peter Holmes. There seemed to be a lot of confusion, a lot of yelling, a lot of screaming. I asked Peter Holmes what the difficulty was, and he said that the policeman would not let the troupe get on the stage, claiming that the troupe was not there as per the contract. I asked the officer if that was so, and he said yes. I asked Peter if the entire troupe was there, as per the contract. He said no, they weren't. He told me that Aleta was not there, nor was Janine Caire there. I went to see Mr. Katleman—

Q. Did you have any conversations at the point with Peter Holmes? A. Oh, yes.

Q. Will you state what that conversation was? A. Something—we discussed the conversations— I was quite mad—we discussed the conversations that had taken place for the entire previous week as to the replacements, and I said, "You told me not to worry, and now look what it happening. How can we do the show?" He explained that one of the girls—one of the girl dancers had been rehearsed that week to replace Aleta, and within a matter of a day or two he would have a replacement for Janine.

Q. Did he say anything about who would be the replacement, if any, for Janine, that night? A. He had

planned on being the replacement himself for Janine that night.

Q. What did you say to him about that? A. "Don't be stupid."

Q. Why did you say that? A. I couldn't picture him singing Janine's songs.

Q. One of them was "Oh, my Man, I Love you so." It just didn't make sense.

Q. Any other conversations—

The Court: Did he tell you he was going that?

The Witness: He said he was going on.

Q. He told you he, a man, was going to sing, "Oh, My Man I Love You So."?

The Witness: He didn't say that; he said he was going to sing her numbers. That was one of the numbers.

The Court: Do you want the jury to understand he was going to sing "Oh, My Man, I Love You So"?

The Witness: At that point anything was possible, sir.

By Mr. Foley: Q. Then what did you do, Mr. Gerber? A. I went to find Mr. Katleman to discuss the situation with him. He didn't choose to discuss it in too much detail. He said, "Roy, it is finished; it is over. They can't present their show as they are contractually obligated to do so. Make arrangements and send them home."

I argued with him. I told him one of the chorus girls could replace Aleta in her numbers; that we would find a replacement for Janine.

He said, no, his contract was for the existing show; that was the show he wanted, and if we couldn't fulfill the contract that there was no sense in continuing the discussions.

Q. Then what did you do? A. I told him that it would not be a matter of wither his deciding or my deciding whether the contract had been fulfilled or not fulfilled. I felt a situation such as this should be discussed and decided on by AGVA.

Q. Then what occurred? A. The kids went back into their respective dressing rooms. The show started.

Q. Not the La Nouelle Eve show? A. No, sir. Jack Wallace, the record act, was introduced. He went out, performed—

Q. All right. Then proceed. You stated that the shutdown went on. A. When you asked who was backstage, I think I neglected to mention that Mr. Haettel was there.

We then had conversations later that evening between Mr. Haettel, myself and Mr. Katleman with regard to whether or not the contract had been fulfilled or not.

Q. Was there anyone else present at those conversations? A. Peter Holmes was there. His attorney—I believe he was his attorney—was there.

Q. Where did these conversations take place? A. They took place in the steak house, I think. Later that evening Mr. Haettel and I were in the front lobby of the hotel again with Peter, because the same situation prevailed on the second show that evening.

Q. What were the discussions? A. Just 'Give us a ruling on the situation. Is it or isn't it a contract at this point? Has the contract been broken?'

Q. Did Mr. Haettel make a ruling? A. No, he did not. He chose to wait until Mr. Maezzi, who was due in town the next morning, arrived." [Rep. Tr. 2515-2520].